Workers' Compensation Appeals Tribunal

COMPENSATION APPEALS FORUM

Tribunal d'appel des accidents du travail

Workers' Compensation Appeals Tribunal
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COMPENSATION APPEALS FORUM

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FROM THE EDITORS
MESSAGE DE LA RÉDACTION

Welcome to the latest issue of the *Compensation Appeals Forum*[1], published by the Workers' Compensation Appeals Tribunal of Ontario.

The Tribunal, under the chairmanship of S. Ronald Ellis, Q.C., determines appeals from the Workers' Compensation Board of Ontario, respecting workers' entitlement to compensation and employer assessments. The Tribunal also determines other matters arising under the Workers' Compensation Act, including the adjudication of issues involving workers' rights to commence civil actions with respect to work-related accidents.

In the *Forum* we publish analytical comment from our constituencies and other observers concerning the Tribunal's decisions and processes or general compensation principles.

We invite readers to submit papers, case comments, letters and replies to articles appearing in previous issues, for consideration for publication. Submissions may be written in either English or French. All submissions should be directed to the address at the front of this publication.

Submissions will be reviewed by the Editorial Board, and will not be seen by decision-making members of the Tribunal until published. The Board reserves the right to reject, edit or condense all submissions and does not assume responsibility for the loss or return of manuscripts.

C'est avec plaisir que nous vous présentons le dernier numéro du *Compensation Appeals Forum*[1] du Tribunal d'appel des accidents du travail de l'Ontario.

Le Tribunal, sous la présidence de Monsieur S. Ronald Ellis, c.r., entend et tranche les appels des décisions rendues par la Commission des accidents du travail de l'Ontario en ce qui a trait au droit à l'indemnisation des travailleurs et aux cotisations payées par les employeurs. De plus, le Tribunal décide des autres questions qui surviennent en vertu de la Loi sur les accidents du travail, y compris celles qui concernent le droit des travailleurs d'intenter une action en justice dans le cas de litiges reliés aux accidents du travail.

Dans le *Forum*, nous publions les commentaires analytiques sur les décisions et les procédures du Tribunal ainsi que sur les principes généraux d'indemnisation soumis par les divers groupes qui s'intéressent au système d'indemnisation des travailleurs accidentés.

Nous invitons nos lecteurs à nous soumettre, aux fins de publication, des articles, des commentaires sur les décisions, des lettres ou des réponses aux articles parus dans les numéros précédents. Nous accepterons les articles présentés soit en français soit en anglais. Veuillez faire parvenir vos articles à l'adresse qui paraît sur la couverture de cette publication.

Les articles soumis seront examinés par le comité de rédaction; les membres des jurys du Tribunal n'en prendront pas connaissance avant leur publication. Le conseil de rédaction se réserve le droit de rejeter, de réviser, ou de condenser tous les articles présentés et ne se tient responsable ni de leur perte éventuelle ni de leur renvoi.

CAUSATION IN THE COMMON LAW

Rino A. Stradiotto, Q.C. *

This paper was adapted from a presentation at a Workers' Compensation Appeals Tribunal seminar on the "Medical/Legal Aspects of Causation."

The aim of this paper is to impart an understanding of the concept of causation and how it is dealt with in the common law, in the hope that it will be of assistance to persons engaged in the workers' compensation process.

The law of causation is the most difficult and contentious element in the equation designed to impose legal liability. There has been an explosion in tortious litigation in recent years to the extent that it is seemingly an omnipresent force in today's society. In the beginning, the law of torts was a finite set of independent rules and the courts were most reluctant to recognize new heads of liability. In the watershed decision of the House of Lords in the case of *Donoghue v. Stevenson*, [1932] A.C. 562, the Law Lords made it clear that the courts were prepared to recognize a broad general theory of tortious liability. The facts that gave rise to this decision were relatively simple. Mr. Donoghue was out with his fiancé, Miss McAllister, on a warm summer evening in August and decided to stop at a café owned by Mr. Minchella. The café was located in the small town of Paisley, Scotland. Mr. Minchella personally waited on Mr. Donoghue and Miss McAllister. Mr. Donoghue ordered a pear and ice for himself and a gingerbeer soda for Miss McAllister. A gingerbeer soda consists of a mixture of ice cream and ginger beer.

Mr. Minchella brought a glass containing some ice cream to the table and an opaque bottle of ginger beer soda that was manufactured by Stevenson. Mr. Minchella opened the sealed bottle of ginger beer soda and poured approximately one half of its contents into the glass containing the ice cream. When Miss McAllister had consumed the most part of what had been poured for her by Mr. Minchella, the attentive Mr. Donoghue proceeded to pour the balance of the ginger beer soda into the glass. In the course of doing so, out slithered the decomposed remains of a snail. The delicate Miss McAllister promptly ejected the contents of her stomach and subsequently alleged that she suffered a severe case of frazzled nerves and gastroenteritis as a result of the incident.

In the course of delivering his judgment, Lord Atkin stated, at p. 580:

> [I] content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of 'culpa', is no doubt based on the general public sentiment of moral wrong doing for which the offender must pay.

The principle enunciated by Lord Atkin in this judgment is generally referred to as the "neighbour" principle and, translated into non-legal terms, it imposes a duty on every individual to conduct his or her affairs so as not to harm or injure the interests of a neighbour. This principle is consistent with the classical definition of negligence, which is found at p. 784 in the case of *Blyth v. Birmingham Waterworks Co.* (1856), 11 Exch. 781 as follows:

> [T]he omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

There are a number of basic elements which must

be found before a liability in tort will arise, and they are as follows:

> 1) There must be a duty of care which arises out of the nexus or relationship between the parties. Generally speaking, the duty is to exercise reasonable care.
> 2) There must be a breach of the duty of care expected in the given circumstances. Again, generally speaking, the courts will apply the standard of the reasonable man.
> 3) There must be damage.
> 4) The damage must be causally linked to the breach of the duty.
> 5) The damages must not be too remote in law.

It is elements 4 and 5 which are the main focus of this paper.

"BUT FOR" TEST

The best known theories of causation are threefold: The "but for" test, "the cause in fact" test and the "legal" or "proximate cause" test. In each instance the onus is on the plaintiff to prove that in the circumstances the plaintiff is entitled to be compensated for the loss sustained by the action of the defendant from whom compensation is sought.

Simply stated, the "but for" test requires the plaintiff to establish that "but for" the negligent activity of the defendant, the plaintiff would not have occasioned the loss sustained. In the case of *Cork v. Kirby MacLean Ltd.*, [1952] 2 All E.R. 402 (C.A.), Denning, L.J. stated, at p. 407:

> If you can say that the damage would not have happened *but for* a particular fault, then that fault is in fact a cause of the damage; but if you can say that the damage would have happened just the same, fault or no fault, then the fault is not a cause of the damage.
> [Emphasis added]

The "but for" test is the least difficult in theory and the least useful in practice. In the case of *Matthews v. MacLaren*, [1969] 2 O.R. 137, affirmed [1972] S.C.R. 441, the deceased fell overboard from a cabin cruiser into frigid Lake Ontario and suffered a heart attack. An action against the negligent rescuer was dismissed on the premise that the death would probably have resulted in any event. In the reasons for judgment, it was stated, at p. 146:

> It is trite law that liability does not follow the finding of negligence, . . . unless the defendant's conduct is the effective cause of the loss . . . I am reluctantly forced to the conclusion that, on the balance of probabilities, it has not been shown that Matthews' life could have been saved. The defendant's negligence therefore was not the cause of Matthews' death and there can be no liability.

The probability was that the deceased had passed away before the rescue attempt had even begun so there could be no liability for the rescue attempt even if negligently executed. The limitations of the "but for" test are apparent in cases in which the plaintiff's loss can be ascribed to more than one cause.

In *Lambton v. Mellish*, [1894] 3 Ch. 163, the plaintiff instituted an action against two operators who each operated a merry-go-round. The action was based in nuisance with the plaintiff alleging that the noise which emanated from the two organs constituted a nuisance. Each of the defendants in turn argued that the noise which emanated from its single organ was not of the kind, duration or degree sufficient to constitute a nuisance, and that it could not be said that "but for" the noise emanating from its single organ a nuisance was constituted. In fact, there could be no nuisance "but for" a similar noise emanating at the same time from the other defendant's organ. The court rejected the argument and held both operators liable. It is apparent from this case that the "but for" test is particularly suited to situations where, on the balance of probabilities, it can be demonstrated that there is a single cause for the plaintiff's loss.

CAUSE IN FACT

The "cause in fact" theory of causation is slightly more flexible. Generally, this theory requires the plaintiff to demonstrate that on recognized evidentiary principles the damage suffered was a "natural and probable consequence" of the defendant's activity. In the case of *Re Polemis and Furness, Withy and Co. Ltd.*, [1921] 3 K.B. 560, a plank was negligently dropped into a ship's hold and generated a spark, which ignited volatile vapours in the hold. The issue arose as to whether the author of the negligent act should be liable for the loss of the ship that was destroyed by the resulting fire. Scrutton L.J. summarized the result of the decision as follows, at p. 577:

> To determine whether an act is negligent, it is relevant to determine whether any reasonable man

> would foresee that the act would cause damage; if he would not, the act is not negligent. But if the act would or might probably cause damage, the fact that the damage it in fact causes, is not the exact kind of damage one would expect is immaterial, so long as the damage is in fact directly traceable to the negligent act, and not due to the operation of independent causes having no connection with the negligent act, except that they could not avoid its results. Once the act is negligent, the fact that its exact operation was not foreseen is immaterial.

Under the *Polemis* doctrine, the plaintiff's damage would be considered to have been caused by the defendant's activity if it were a direct result of the said activity. The *Polemis* doctrine was immediately criticized by legal scholars and jurists as it held individuals responsible for damages which were not foreseeable and, in the end result, imposed liability where fault did not exist. Furthermore, the critics alleged that the standard which held that damages had to be a direct result of the defendant's activity led the law of causation into philosophical and metaphysical aspects which clouded the issues as to the proper basis on which legal liability should be imposed and, as Frederick Pollock once stated, "the lawyer cannot afford to adventure himself with philosophers in the logical and metaphysical controversies that beset the idea of cause."

I have a vague recollection of another fact situation that repeatedly cropped up in discussions on causation at law school. A farmer tending to the milking of his cow one late dark evening brought with him a lit and unshielded candle. The flickering flame frightened the cow and, in its fear, the cow kicked and knocked over the milking stool, causing the farmer to knock over the unshielded lit candle which started a fire in the straw on the floor of the barn. The fire spread to adjacent fields and then in the direction of the prevailing wind eventually all the way to the city of Chicago, located a considerable distance from the farm. As a result, the city of Chicago was substantially destroyed. The destruction of Chicago could be said to be the direct result of the farmer's negligent activity. But was it foreseeable that the destruction of Chicago some miles away would occur if the farmer tended to his milking chore with an unshielded lit candle? Regardless of the answer to this question, the problem remains as to whether limits should be placed on damages that arise out of particular conduct and the basis upon which the damages are to be limited.

In the case of *Overseas Tank Ship (U.K.) Ltd. v. Morts Dock and Engineering Co. Ltd.*, [1961] A.C. 388 [the *"Wagon Mound"*], persons fuelling a vessel negligently allowed bunker oil to spill into a harbour. The oil was carried by wind and tide to a wharf where the plaintiffs operated as ship repairers. Bunker oil is not readily flammable, but molten metal from the operation of a welding torch at the wharf fell upon waste cotton floating in the oil. The cotton acted as a wick and the oil ignited, causing extensive damage. Under the test in Polemis, the damage by the fire would be considered to be direct, and it was foreseeable that some kind of damage could be caused by the escaping oil. This foreseeability would be all that was required to establish negligence on the part of the defendants and, once negligence was established, the defendant was responsible for all direct damages that were the consequence of the defendant's negligence, whether foreseeable or not.

In the *Wagon Mound* case, Viscount Simonds, speaking for the Judicial Committee, held that the defendant was not liable for the damage caused because it was not a foreseeable consequence of the negligent act. It was stated in the *Wagon Mound* decision, at p. 423:

> For, if some limitation must be imposed upon the consequences for which the negligent actor is to be held responsible--and all are agreed that some limitation there must be--why should that test (reasonable foreseeability) be rejected which, since he is judged by what the reasonable man ought to foresee, corresponds with the common conscience of mankind, and a test (the direct consequence) be substituted which leads to nowhere but the neverending and insoluble problems of causation.

The *Wagon Mound* decision was, at the least, a redefinition of the test of causation that was set out in the *Polemis* case.

In the case of *Cotic v. Gray* (1981), 33 O.R. (2d) 356 (C.A.), Lacourcière J.A. stated at p.372:

> To a large extent the two tests are coextensive; if a reasonable man determines that the damage caused by an act was a "natural", "necessary" or "probable" consequence of the act, he will generally concede that the damage was a foreseeable consequence. But where the damage caused by an act was a direct or necessary consequence when viewed with hindsight but was nevertheless not foreseeable at the time, then no liability obtains.

In *Cotic v. Gray*, the plaintiff's husband suffered serious injuries when his car collided with another one whose driver was killed. Prior to the accident, the plaintiff's husband was subject to emotional upset and to fits of severe depression. Following the accident,

his condition degenerated from a neurotic to a psychotic condition. Sixteen months later he committed suicide, and the plaintiff brought an action for damages for wrongful death against the estate of the other driver. The trial was before a judge and jury, and the jury affirmatively answered the question "did the defendant cause or contribute to the death of the . . . plaintiff's husband by the motor vehicle accident in question?" The trial judge gave judgment for the plaintiff, and the judgment was upheld by the Court of Appeal.

PROXIMATE CAUSE

A difficulty arises in the application of the "cause in fact" theory in situations where the plaintiff's loss almost certainly resulted from the defendant's activity, but the link between the defendant's activity and the plaintiff's loss cannot be established on the basis of current medical or scientific knowledge. In the case of *McGhee v. National Coal Board*, [1973] 1 W.L.R. 1 (H.L.), the plaintiff was employed emptying pipe kilns. He developed dermatitis and alleged that his condition resulted from the absence of a shower at the work site. The plaintiff contended that he sweated profusely in the performance of his duties, and that this allowed the particles of dust to attach to and injure his skin, exposing it to infection. The plaintiff argued that thorough washing of the skin is the only practical method of removing the danger of further infection, yet he was forced to cycle home while still caked with sweat and grime. He alleged that his employer was in breach of his common law duty to him in that he should have provided washing facilities in the work place. The cause of dermatitis could not be ascertained and, under the "cause in fact" theory, the plaintiff would have been without a remedy. On the facts, the court was inclined to adopt a yet broader view of causation and, in the course of delivering judgment, stated as follows, at p. 4:

> The medical evidence is to the effect that the fact that the man had to cycle home caked with grime and sweat added materially to the risk that this disease might develop. It does not and could not explain just why this is so. . . Plainly that must be because what happens while the man remains unwashed can have a causative effect, though just how the cause operates is uncertain. ... But it has often been said that the legal concept of causation is not based on logic or philosophy. It is based on the practical way in which the ordinary man's mind works in the everyday affairs of life.

This decision materially equates increasing the risk with materially contributing to causing the disease. This leap in logic may be justified on policy or compassionate considerations.

In the recent decision of *Buchan v. Ortho Pharmaceutical (Can.) Ltd.* (1986), 35 C.C.L.T. 1 (Ont C.A.), Mrs. Buchan claimed that she sustained a cerebrovascular accident, that is, a stroke, caused by her taking 1/50 Ortho Novum birth control pills manufactured and distributed by the defendant Ortho Pharmaceutical Ltd. The use of oral contraceptives containing the ingredient estrogen is associated with an increased risk of thromboembolism, although the pathogenesis of this increased risk remains unclear. The trial judge, nonetheless, was able to find that Mrs. Buchan's use of 1/50 Ortho Novum probably caused, or at least materially contributed to, her stroke. In the result, Ortho Pharmaceutical Ltd. was required to pay 100 per cent of the damages assessed.

If I were pressed to state which model or theory of causation was applied in the Buchan case I would, with some doubt say, that it was the "legal" or "proximate" cause theory. This theory may have developed in response to situations where the link between the defendant's activity and the plaintiff's loss is not supported by sufficient evidence to discharge the legal burden of proof that was generally applicable to common law tort cases. The label "proximate" should not be taken to confine the issues of cause to notions of proximity in time and space. Rather, the notion of proximate cause is often related to whether the defendant was under any duty to protect the plaintiff against the event which did, in fact, occur. Professor Prosser suggests that proximate cause should be viewed as a series of distinct problems, more or less unrelated, which fall to be determined upon different considerations, such as:

> 1) The problem of causation in fact: What part has the defendant's conduct played in bringing about the result?
> 2) The problem of apportionment of damages among causes.
> 3) The problem of liability for unforeseeable consequences: To what extent should the defendant be liable for results which he could not reasonably have been expected to foresee?
> 4) The problem of intervening causes: Should the defendant be relieved of liability by some new cause of external origin coming into operation at a time subsequent to his conduct and superceding his responsibility?

5) The problem of shifting responsibility: Is there another person to whom the defendant was free to leave the duty of protecting the plaintiff?

A good example of the type of reasoning involved in the "legal" or "proximate cause" model is found in the case of *Baker v. Willoughby*, [1969] 3 All E.R. 1528 (H.L.). In this case, the plaintiff was involved in a motor vehicle accident on September 12, 1964 and, as a result, suffered injuries to his leg which doctors stated would result in continual pain in the ankle. Before the action came to trial, the plaintiff sustained a further injury - he was shot in the leg in a holdup at his place of employment, and the damage caused by the bullet was such that the leg had to be amputated. The defendant argued that the second injury removed the very limb from which the earlier disability had stemmed. Therefore, no loss suffered thereafter could be attributed directly to the defendant's negligence. The trial judge characterized the argument as more ingenious than attractive, but it was accepted by the Court of Appeal. On further appeal by the plaintiff to the House of Lords, the Law Lords rejected the argument and employed the "legal" or "proximate" cause analysis. Lord Pearson described the argument presented by the defense as "formidable", and went on to state, at p. 1535:

> But it must not be allowed to succeed because it produces manifest injustice. The supervening event has not made the appellant less lame nor less disabled nor less deprived of amenities. It has not shortened the period over which he will be suffering. It has made him more lame, more disabled, more deprived of amenities. He should not have less damages through being worse off than might have been expected.

Under the "but for" or "cause in fact" theories of causation, the intervening act that occurred during the hold up would have been sufficient to relieve the initial defendant of liability. Whereas, the flexibility of the "legal" or "proximate" cause theory of causation allows for the incorporation of policy considerations to prevent what appears to be an injustice. Under this theory, even where a second negligent act may appear to break the chain of causation, it is not sufficient to base an analysis of the ensuing responsiblity of each tortfeasor simply on which negligent act occurred first in time.

The courts have explicitly indicated that there is a place for common sense or policy considerations in the analysis of causation and related concepts. In the case of *McGhee v. National Coal Board, supra*, for example, Lord Reid stated, at p. 5:

> [T]he legal concept of causation is not based on logic or philosophy. It is based on the practical way in which the ordinary man's mind works in the everyday affairs of life.

This statement by Lord Reid was quoted in the case of *Powell v. Guttman* (1979), 89 D.L.R. (3d) 180. In the case of *Hay (Bourhill) v. Young*, [1943] A.C. 92 at 110, Lord Wright stated, with respect to where the line should be drawn as to what the hypothetical reasonable man would say is proper to foresee "it should stop where in the particular case the good sense of the jury or of the judge decides."

This statement was quoted by the Ontario Court of Appeal in *Duwyn v. Kaprielian* (1979), 22 O.R. (2d) 736. In the case of *Gallant v. Beitz* (1983), 42 O.R. (2d) 86, Mr. Justice Linden stated that the test for remoteness is foreseeability, and that the Court must look at all the circumstances before it decides the matter. Still, the decision is based not only on the evidence and logic, but must also involve experience and value judgment. In the case of *McLoughlin v. O'Brian* , [1982] 2 All E.R. 298, there is a lengthy discussion as to whether policy is to be considered by the courts in determining liability and the limits of damages. The majority of the Law Lords considered policy to be justified and within the realm and function of a judge. The margin of boundaries of responsibility must be fixed as a matter of policy as to what is justifiable. In the case of *Cotic v. Gray*, cited above, Madame Justice Wilson of the Court of Appeal stated at p. 387:

> The concept that the wrongdoer takes his victim as he finds him has little to do with foreseeability. It has a great deal to do with who, as a policy matter, should bear the loss.

AVOIDING CAUSE

An illustration of the place of policy considerations in the solution of the problem of who should bear the loss may be found in the disputes that involve massive numbers of claimants and multiple potential defendants. The resolution of this type of claim has rewritten the law of causation in tort in the United States. Perhaps it is more accurate to say that it has simply ignored or bypassed the issue of causation. A number of theories have been developed. An early theory is described as the "concert of action" theory. Under this theory joint and several liability is imposed on a defendant who, in pursuance of a common plan

or design to commit a tortious act, actively takes part in it and furthers the act by cooperating or by lending encouragement to other wrongdoers. The onus is then put on the defendant to show that it was not acting in concert.

In the case of *Hall v. E.I. DuPont deNemours and Co. Inc.*, 345 F. Supp. 353 (Dist. N.Y., 1972), thirteen children were injured by the explosion of blasting caps in twelve separate incidents in ten different states between 1955 and 1959. The defendants before the court comprised a majority or substantial percentage of those engaged in the industry. The allegations centred on the failure to warn and to take appropriate safety measures. The plaintiff could not identify any particular manufacturer as being the provider of the blasting cap that caused the injury. It was found that the defendants acted independently, but adhered to industry wide standards, and that there was industry wide cooperation in labelling, warnings, etc. The court concluded that, in effect, the defendants jointly controlled the risk. The court imposed the onus on the defendants to disprove causation if they could, otherwise each would be jointly and severally liable for all of the damages. This case came to be known as the case that established the "enterprise" or "industry wide" theory of liability which seeks justification on the basis that, since the defendants were joined in the action and they accounted for a substantial percentage of the producers, this was adequate to satisfy the plaintiff's obligation of proving that the injury was caused by a product made by any one of the defendants from whom damages were sought.

In the case *Sindell v. Abott Laboratories*, 26 Cal. 3d 588 (1980), the plaintiff alleged that she suffered adeno carcinoma, cancerous vaginal and cervical growths which required extensive surgery, as a result of the drug diephystilbesterol (DES) that was taken by her mother. DES is a synthetic compound of the female hormone estrogen which was prescribed to prevent miscarriage. The plaintiff could not identify the manufacturer that supplied the DES taken by her mother. Nor could she identify all of the manufacturers. It was estimated that over 200 manufacturers were at one time in the business, that there were between 1.5 and 3 million users, and that hundreds of thousands of daughters were affected. The *Sindell* action involved only eleven of the drug companies that made the product. The solution to the plaintiff's problem establishing causal relationship was found in the reasoning that came to be known as the "market share liability" theory.

This theory is an extension of an earlier theory known as the "alternative liability" theory which was first expounded in the case of *Summers v. Tice*, 33 Cal. 2d 80 (1948). In the *Summers* case, the plaintiff was injured when two hunters shot in the same direction. It could not be determined which defendant fired the bullet that injured the plaintiff and the court concluded that, where there are two or more parties who are both wrongdoers and who are shown to have been a possible cause of the damage, they may be held jointly and severally liable for all the damages. The onus is shifted to any one of the defendants to prove that he was not a cause of the damage. The justification for this shift of onus or by-passing the need to establish causation is found in the fact that all of the wrongdoers were before the court and one of them had to be the cause.

This was not the case in *Sindell*, as a very small number of the 200 manufacturers were before the court--in effect, only five. The court was prepared to extend the "alternative liability" theory on the rationale that the small number of manufacturers joined as defendants represented a substantial share of the market, approximately 90 percent, so it was justifiable to shift the burden of proof to each of the defendants to exculpate itself and prove it was not their product that caused the alleged damage. When the court came to apportion damage, it did not find that each of the defendants found liable were jointly and severally liable for all of the damages, but only that each defendant was liable for the proportion of the judgement represented by its share of the market. Under the "concert of action" or "enterprise" theory of liability, in contrast, each defendant found liable was found to be jointly and severally liable for all of the damages.

In a subsequent case, *Bichler v. Elli Lily and Co.*, 55 N.Y. 2d 571 (1982), the plaintiff, also a DES victim, did not sue the defendants that represented a substantial share of the market, as was the case in *Sindell*. The court concluded that it was sufficient for the plaintiff to sue one or more manufacturers and show either that the defendant and the other manufacturers consciously paralleled each other or that the defendant and the other manufacturers acted independently in the same way, so that the defendant's action encouraged the same conduct in others. This theory came to be known as the "civil conspiracy" theory, an extension of the "concert of action" theory. The court in the *Bichler* case concluded that, under this theory, any number of defendants would be jointly and severally liable for all of the damages. It is apparent that under this theory a significant number of the defendants found liable could not possibly have produced the product that caused the alleged injury. In the result, the issue of causation becomes secondary to the fact that there was participation in an activity found to have caused injury.

These decisions illustrate how, confronted with certain circumstances, the common law will often move away from fundamental concepts and principles and espouse new ones. Perhaps these theories are more an expression of policy than principle adopted to achieve a desired result.

CONCLUSION

Perhaps, at this point, I might suggest some guidelines that might be extrapolated from the common law system:

1) Workers' compensation administrative tribunals should attempt to maintain a certain level of consistency in their proceedings, procedurally and substantively. Similar issues of fact and law should be resolved on similar principles that produce similar results. The principle of *stare decisis* in common law is designed to achieve this result. Justice must not only be done, it must be seen to be done and, without consistency, it will not be seen to be done.

2) Theoretical flexibility must be cultivated and maintained. This may seem to be in direct contradiction to the first guideline, but in reality the two guidelines are complementary. The nature of claims and the facts and circumstances giving rise to claims are constantly changing. Without theoretical flexibility, the workers' compensation scheme risks being perceived as outdated and ineffective, if not irrelevant.

3) The basis of the decision should be clearly enunciated, whether it be statutory interpretation, principle or policy. Medical evidence and opinion and legal principles do not provide a simple positive or conclusive answer in all cases. If the decision is based on policy considerations, or even compassionate reasons, it should be openly acknowledged. Such reasoning will often be more respected than an artificial or tortured attempt to justify a holding on principles of statutory interpretation or principles of law or on the rejection of sound medical evidence and opinion. I have already indicated the extent to which our courts have on occasion openly acknowledged the application of policy in the resolution of a specific problem. The challenge is to determine the policies, objectives and economic realities which will guide the Tribunal's exercise of its authority.In the final analysis, it should be borne in mind that the legal distinction between what is proximate and what is remote is not a logical one, nor does it depend upon relations of time and space. It is purely practical, the reason for distinguishing between proximate and remote causes and consequences being a purely practical one.

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LEGAL AND MEDICAL ATTITUDES - ASPECTS OF CAUSATION

T.P. Morley, M.D., F.R.C.S.C.*

"Isn't there a fundamental difference between etiology and causation? The etiology of his pain is a prolapsed lumbar disc; the cause of his pain is a work accident."

"I still don't have it clear in my mind. In this case two propositions have been advanced: A sprain and a prolapsed disc. You are saying they are diagnoses; I would say each is simply 'etiology'. I still don't really know what a diagnosis is. It seems to be a blending together of all these concepts."

INTRODUCTION

The anguish in the above quotations taken from a Workers' Compensation Appeals Tribunal seminar is understandable. Word usage in legal matters is more precise than in medical matters. The legal practitioner is disciplined to use words with great accuracy in order to fulfil his function. Words are not the stock-in-trade of the medical practitioner but words are the life-blood of the legal profession. Without this tool the law cannot organize society.

If the sophisticated use of words is the mark of a learned profession, medicine no longer qualifies. It does not need to. Compassion, understanding human behaviour in sickness and in health, reliability and, as perceived by the patient, knowledge, are attributes that make for a successful medical practitioner. Admittedly, doctors do not have a monopoly of these virtues but what makes a good doctor is less tangible than words. The refined use of words is not essential to medical effectiveness. Small wonder that the two professions may have difficulty in reconciling their peculiar approach to some of the problems that come before the Workers' Compensation Appeals Tribunal (the Tribunal).

DIAGNOSIS

Medical students have it drummed into them that the first step in patient management is to make a diagnosis. Failure to do so inevitably leads to irrational management. When a doctor admits, "I do not know." "I cannot make a diagnosis," it follows that any treatment the patient receives is hit-or-miss. It is almost better to make the wrong diagnosis than no diagnosis at all. A wrong diagnosis can be changed as information comes in. Doctors are always making the wrong diagnosis in the early stages of trying to solve a clinical puzzle. If medical reports arrive prematurely at the Tribunal hearing stage, a panel may come to the wrong decision. Physicians must strive to complete the refinement process which reduces the diagnostic possibilities to one.

The word "diagnosis" means an understanding of the case *through knowledge*. If you know enough about the case by way of history and physical findings, then you may grasp the true nature of the illness.

Diagnosis is subdivided into several categories:

Differential diagnosis - is the listing of alternatives in order of preference. *Provisional diagnosis* may be used synonymously. In the initial stages of searching for the diagnosis, the differential or provisional diagnosis will be in the form of a list which, as investigation proceeds, is curtailed until, hopefully, a single *final diagnosis* is recorded.

Clinical diagnosis - arises from the study of the history and physical examination, and the results of special diagnostic tests requested by the physician.

Physical diagnosis - refers to information derived from physical or hands-on examination alone. By itself, a physical examination is fairly uninformative. Ninety percent of a diagnosis is derived from the history.

The usual role of the physical examination is to corroborate what has already been deduced from the history.

Laboratory diagnosis - Usually refers to information derived from laboratory tests alone. The information may take the form of a bare statistical report of the test results without comment, or it may include a brief comment as to the significance of the result. In general, laboratory diagnosis should not be accepted as the sole criterion for any condition.

CAUSE AND ETIOLOGY

The clinician alone is not always able to point to the cause of the condition he has correctly diagnosed. For example, the identification (i.e. diagnosis) of lung cancer can only be confirmed by the clinician, but the toxicologist, epidemiologist, the industrial medicine specialist, the statistician are all in a better position to give an opinion on the possibility of the cancer having been caused by the work environment. Of course the attending physician himself may be expert in one or all of these fields. Sometimes the condition diagnosed is endemic in the local population. The weight of numbers then establishes a probable causal relationship between the work environment and disease, while individual case studies could not.

Some diagnoses are not diagnoses at all, but simply descriptions of symptoms. A term such as neuralgia, which means nerve pain, gives no clue as to the pathology or the cause. It is a descriptive label of a symptom. Qualification of the word can get us a little closer. Trigeminal neuralgia is pain in the face within the territory of the trigeminal nerve; post-herpetic neuralgia is pain that persists after an attack of shingles (*herpes zoster*), but there is no hint of the mechanism by which the cause of the pain exerts its effect.

Take the case we started out with: a prolapsed disc that causes pain. The relationship of the causative accident to the resultant pain can be analysed:

1. The trauma of the accident causes physical injury to the ligaments that hold the intervertebral disc in place so that they no longer fulfil their restraining function.

2. The soft inner part of the disc (*nucleus pulposus*) escapes, or prolapses, from its natural location between two vertebral bodies and comes to rest against the adjacent root of a nerve that supplies the leg.

3. Pressure on the root interferes with conduction of both sensory and motor fibres within it. Depending on the severity of the compression, the patient may experience pain, tingling, numbness, weakness or paralysis of the part supplied by the nerve.

"Cause" and "etiology" are, in most contexts, synonymous in medical terminology, except that "etiology" is always reserved for an explanation, in pathological terms, of cause. A doctor would not say the accident was the etiology of the prolapse; he would say the accident caused the rupture of the ligaments, and that the traumatic rupture of the ligaments was the etiology of the nucleus prolapse. He might, alternatively, say the accident caused the ligament rupture, which caused the prolapse of the nucleus, which caused pressure on the nerve root, which caused the pain in the leg. There is something to be said for the removal of "etiology" altogether from the vocabulary of medical jargon.

ILLNESS, DISABILITY AND DISEASE

In medical semantics there is a distinction between disease and illness. These terms are not synonymous although they are often wrongly so used. "Disease" is a pathological condition which may or may not result in illness. "Illness" is the state of not feeling well. A person in normal health killed in the street is found at autopsy to have cancer of the stomach. Before his death he was not ill but he certainly had a disease - cancer. Illness is due to disease which may or may not be identified. The disease that causes the illness may be physical or psychological.

Although meanings may overlap, "disability", in medical terminology, means an inability to carry out normally whatever you might expect of yourself during the day. It is a purely descriptive term for failure to function normally, and carries no implication of the cause, whether structural (i.e. physical or organic), psychogenic or anything else. Disease, on the other hand, implies disturbance of tissue structure or of normal biochemical reactions of the body.

The attempt to correlate structure with function has for centuries been the most informative means by which disease has been studied. The desire is to demonstrate deranged structure or metabolism and to use it to decipher the nature, hence the cause, of disease. For example, the search for abnormal cellular metabolism in schizophrenia takes precedence over attempts to account for it in sociological terms. In more mystic circles than ours, disturbed function is attributed to divine or astral intervention. The search

for abnormal structure or metabolism is then irrelevant. The strength of mystic theories of disease is their indifference to scientific proof. A declaration is all that is needed to translate fancy into fact. Our concept of the nature of disease rests on proven disturbance of structure or metabolism.

The West has lagged behind other societies in at least one aspect of medicine: the influence of the mind over the body. But there are now numerous examples that satisfy the scientific sceptic of the mind's influence, through nervous activity and hormone production, each arising in the brain, of both beneficial and harmful effects on the body's tissues and function. Modern medicine gave no serious attention to the concept of "mind over matter" until the mediating role of physico-chemical exchanges had been demonstrated.

DIAGNOSIS AND CAUSATION

In medicine, diagnosis and causation are usually mingled into one concept. Post-traumatic epilepsy, radiation fibrosis, alcoholic dementia are diagnoses used by the clinician as the foundation for treatment. As we have seen, without a working diagnosis treatment is irrational. The Tribunal, on the other hand, has no interest in treatment. Its only interest is in causation: If epilepsy was caused by injury, was the injury caused at or by the claimant's work?

The responsibility of the Workers' Compensation Board (the Board) is straightforward in those claims that never have to be appealed. There is no argument over a claim for a broken leg from a fall on the construction site due to the failure of construction equipment. But many of the claims that reach the Tribunal are clouded by imprecise diagnosis. The doctor is accustomed to diagnostic uncertainties and is ready to change the diagnosis in his continued handling of the case. Diagnostic modifications implicit in the terms "pre-existing disease", "co-existing disease", "aggravation", "precipitation" do not haunt the doctor as they must the Tribunal, whose very different purpose is to judge past events rather than to prescribe for the future.

CONFLICTING MEDICAL OPINION

Medical science is not the same as the practice of medicine. The practice of medicine enlists the fruits of science in its management of patients, but is not, in so doing, employing the scientific method. Indeed, there is little "scientific" in medical practice and this must be clearly understood by the Tribunal or it will seek answers that medicine cannot provide. Technology assists but does not replace medical opinion. The polygraph, when used as a lie detector, can be unreliable and misleading. The visible evidence of a brain scan, a biochemical test or an intelligence test are all prone to uncertainty and all require expert medical interpretation, which may not be consistent from one expert to the next. Conflicting medical opinions can only be avoided by refusing to listen to more than one opinion! The attempt to resolve conflicting medical opinions is an important function of the pre-hearing preparation, but medical disagreement will not always be resolved before the hearing itself.

Where uncertainty surrounds medical issues, the Board and Tribunal may compound their difficulty by obtaining more and yet more opinions. Yet the system demands that this is the way to unearth the truth. Somewhere amongst the array of opinions the diagnostic truth may indeed lie. But where?

There are several escapes from this predicament. The Tribunal can:

1. Ignore the medical evidence completely and make up its own mind about the case, including the medical aspects.
2. Select the opinion(s) that support the view it has already arrived at on non-medical grounds - the circumstances of the accident, etc.
3. Decide, by criteria of its own choosing, which doctor or doctors it assumes will give the "best" opinion and ignore the rest -- in effect, arbitrate the merits of the doctor rather than the reports.
4. Summon an independent doctor to the hearing to assist the panel in its understanding of the medical issues and the basis for medical conflict.

There is merit in each of these practices. Even the first, which sounds outrageous, has in fact been adopted by the Tribunal on occasion. By ignoring medical advice a panel must either be its own diagnostician or settle the issue on non-medical grounds. [***Ed. note**: For a discussion of the Tribunal's practice when reviewing conflicting medical opinion, see* **Decision No. 915** *(1987), 7 W.C.A.T.R. 1, pp. 78-81, "The Tribunal's Normal Role in Reviewing a Typical Medical Issue."*]

CONCLUSION

Medical and legal attitudes differ because each has

its distinct purpose. No benefit is served by attempts at homogenization. The medical profession provides clinical information and opinion as to cause; the Tribunal adjudicates and arbitrates. Trespass brings no advantage to either partner.

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THE LEGAL FRAMEWORK FOR CAUSATION QUESTIONS THAT ARISE UNDER THE WORKERS' COMPENSATION ACT

Michael S. Green*

INTRODUCTION

The purpose of this article is to outline the issues of a causal nature that arise in the workers' compensation system in Ontario.

The problems that have plagued us in attempting to understand the regime of causation in the *Workers' Compensation Act*, R.S.O. 1980, c. 539 (the Act) are twofold:

1. the statute is convoluted and difficult to comprehend,
2. certain confusing terms of art have become common to all the system's practitioners.

STATUTORY FRAMEWORK

Section 3(1) is the gateway to the Act. It provides:

> Where in any employment, to which this Part applies, *personal injury by accident arising out of and in the course of employment is caused to a worker*, the worker and the worker's dependants are entitled to benefits, in the manner and to the extent provided under this Act.
> [emphasis added]

Section 40 makes the connection between the injury described in s. 3(1) and temporary disability:

1. where injury to a worker results in temporary total disability...

2. where temporary partial disability results from the injury...

Section 45 makes the connection between the injury described in s. 3(1) and permanent disability:

where permanent disability results from the injury...

Interpreting Section 3(1)

The phrase "personal injury by accident arising out of and in the course of employment is caused to a worker" is not a shining example of statutory drafting. One approach to understanding the phrase is to break it down into its constituent parts - "personal injury", "by accident" and "arising out of and in the course of employment" and then to attempt to determine their relationship.

Constituent Parts of Section 3(1)

I do not intend to comprehensively review the law with respect to the meaning of "accident" or "arising out of and in the course of employment" - that would be another article or rather a series of articles. Instead, I hope to deal briefly with each term.

The term "personal injury" is not defined in the Act. It is defined in *Black's Law Dictionary* (5th ed. (St. Paul: West Publishing Co., 1979) at 707) as:

> "in a narrow sense, a hurt or damage done to a man's person as distinguished from an injury to his property or reputation. The phrase is chiefly used in this connection with actions of tort for negligence and under workers' compensation statutes."

Accident is defined in s. 1(1)(a) of the Act as including:

(i) a wilful and intentional act, not being the act of the worker,
(ii) a chance event occasioned by a physical or natural cause, and
(iii) disablement arising out of and in the course of employment.

The terms "chance event" and "disablement" are of course capable of several interpretations. There is, for instance, disagreement between the Workers' Compensation Appeals Tribunal (the Tribunal) and the Workers' Compensation Board (the Board) over whether an internal event, such as a sudden onset of pain, constitutes a chance event or a disablement. (See *Decision No. 72* (1986), 2 W.C.A.T.R. 28 (Ont. W.C.A.T.) and the review of that decision under s. 86n of the Act by the Board's board of directors).

The disablement definition of accident poses special problems, which I will discuss later.

The phrase "arising out of and in the course of employment" has been defined in various Board polices and Tribunal decisions. (Eg. the Board's *Claims Services Division Manual*, s. 3(1), pp. 41-51, Directives 1-23; *Decision No. 44* (1986), 2 W.C.A.T.R. 8, and *Decision No. 369* (1986). It is described by G. Dee, N. McCombie and G. Newhouse as a "test of work-connectedness". (See *Workers' Compensation in Ontario* (Toronto: Butterworths, 1987) at 65.) It contains by implication references to the time and place of the accident and the type of activity carried on by the worker at the time of the accident.

Relationships Among the Constituent Parts of Section 3(1)

The statute is unclear with respect to the relationships among "employment", "accident" and "injury" required for compensation to flow. One view is that a relationship between the employment and the injury is all that is required. A second view is that there must be a relationship between the employment and the accident and a relationship between the accident and the injury.

The Tribunal has not taken a clear view on this issue. In *Decision No. 947/87 (1988)*, the issue was whether a worker who had been involved in a fight with his union representative over a grievance had suffered a personal injury by accident arising out of and in the course of employment. The majority states at p. 4 of the decision:

> For there to be a personal injury by accident arising of and in the course of employment, a panel must be satisfied that there is a sufficient causal connection between the employment and the accident giving rise to the injuries. Many of our decisions have indicated that, for there to be a sufficient causal connection, a panel must be satisfied that the employment was a significant contributing factor to the resulting injury.

This passage illustrates an ambivalence about the required causal connection. (The minority in this decision is clear. A relationship between the accident and the employment is required).

This same ambivalence may be found in Dee, McCombie and Newhouse (*op. cit.* at 65-67). The authors state at p. 65:

> As a general rule, both aspects of the work-connectedness test must be met. The personal injury by accident must both arise out of the employment and arise in the course of the employment. For example, a typical office worker travelling to work on a public bus may become involved in a motor vehicle accident. Although the *accident* arose out of the employment, in that it happened as a result of the worker travelling to work, it did not happen in the course of employment...
> [emphasis added]

The authors state at p. 67:

> In essence, the "arising out of" test is one of establishing a causal relationship between the work activity and the *injury*.
> [emphasis added]

The wording of the presumption clause in s. 3(3) does suggest that a relationship between the accident and the employment is required. This section provides:

> Where the accident arose out of the employment, unless the contrary is shown, it shall be presumed that it occurred in the course of employment...

In the case of an ordinary accident, such as a fall or the lifting of a heavy weight, where the accident is clearly distinct from the injury, one would therefore expect that a relationship between the accident and the injury would be required.

To illustrate this point, consider the case of a fight as occurred in *Decision No. 947/87*. The worker is involved in an argument with his union representative over a grievance. In the course of the argument, the worker uses personal epithets and the union representative punches him. The issue in this case is

clearly the relationship between the employment and the "accident", the blow struck by the union representative. In this context, the most important factor is the reason for the fight.

Now suppose that there was a dispute as to the nature of the blow struck by the union representative and the injury suffered by the worker. Suppose the representative said that he struck the worker in the stomach but the worker did not seem to be hurt. The worker said that the representative struck him in the shoulder, that his shoulder was hurt and that he had no stomach problem. This state of affairs raises the question of the relation between the accident, the blow struck by the union representative, and the worker's shoulder injury.

This analysis does not address the case where there is no external event that could be a cause for the worker's injury. As mentioned earlier, it is a matter of dispute whether these "accidents" are chance events or disablements.

Disablement

In the disablement context, the required causal relationship in the Act is even more obscure than in the chance event context. The definition of accident in s. 1(1)(a)(iii) of the Act is "disablement arising out of and in the course of employment." If this definition of accident is plugged into s. 3(1), the result is:

> Where...personal injury by disablement arising out of and in the course of employment arising out of and in the course of employment is caused to a worker....

Aside from the obvious problem of the duplication of "arising out of", the phrase "personal injury by disablement" does not have a clear, plain meaning.

Traditionally, a disablement has been considered to be an injury sustained by a gradual process. (See the Board's *Claims Services Division Manual*, s. 1(1)(a), p. 1, Directive 2.) It has recently been considered by the Tribunal to include a disease that does not qualify as an industrial disease within the meaning of the Act. (See for example *Decision No. 850* (1988).) The board of directors of the Board has recently decided that in its opinion a sudden onset of pain without discernable cause is disablement. (See the s. 86n review of *Decision No. 72*.)

What is common to all these interpretations is that the disablement refers to the injury that is caused by a process, rather than the process or event that leads to the injury. It is therefore my view that the phrase "personal injury by disablement" does not have a meaning. Rather, in my view, the disablement definition of accident in itself contains three elements:

1. an injury, (including, it seems, a disease),
2. a process (perhaps including exposure to a substance),
3. arising out of and in the course of employment.

The disablement definition of accident, in itself, contains the same causal relations as apply when the chance event definition of accident is plugged into s. 3(1).

The usual issue that arises in disablement cases is whether the injury suffered by the worker is related causally to a particular process that was performed in the course of employment, for example, the repetitive motion cases.

It will be rare for the issue to be whether the process arose out of and in the course of the worker's employment. However, this could happen. For instance, suppose a worker was required to walk to work some distance each day because of the remoteness of the workplace and the unavailability of other transportation options. The worker suffered a foot injury as a result. This example raises the question whether the "long-distance walking" arose out of and in the course of employment.

SUMMARY WITH RESPECT TO SECTION 3(1)

Both the chance event and disablement definitions of accident have possible broad and narrow meanings. Assuming a narrow meaning is chosen for each, the following causal relations are present in s. 3(1):

1. An injury [sustained by]
2. chance external event or gradual process [arising out of and in the course of]
3. employment.

In the case of the chance event definition, these relations are derived from plugging in the chance event definition of accident into s. 3(1). In the case of the disablement definition, these relations are implicit in the definition itself.

This scheme does not deal with the relationships required where there is no external cause for the injury, such as a sudden onset of pain as occurred in *Decision No. 72*.

INDUSTRIAL DISEASE - INTERPRETING SECTION 122

Section 122 of the Act provides:

> Where a worker suffers from an industrial disease and is thereby disabled...and the disease is due to the nature of any employment in which he was engaged...the worker is...entitled to compensation as if the disease was a personal injury by accident and the disablement was the happening of the accident.

The definition of industrial disease in s. 1(1)(n) has been broadened by the *Workers' Compensation Amendment Act, 1984 (No.2)*, S.O. 1984 c.58, s. 1(5), to include:

> (i) a disease *resulting from* exposure to a substance relating to a particular process, a trade or occupation in an industry;
> (ii) a disease peculiar to or characteristic of a particular industrial process, trade or occupation;
> (iii) a medical condition that in the opinion of the Board requires a worker to be removed either temporarily or permanently from exposure to a substance because the condition may be a precursor to an industrial disease, or
> (iv) any of the diseases mentioned in Schedule 3 or 4.
> [Emphasis added]

It is worth noting that this broadened definition of industrial disease should eliminate the problems noted in *Decision No. 850* with the pre-amendment definition. It is no longer necessary to show that the disease is *peculiar to or characteristic of* a particular occupation for it to be considered an industrial disease. It will suffice if the disease *results from* exposure to a substance relating to a particular process in an occupation.

Using this broad definition of industrial disease, it seems that the causal scheme is:

1. a disease [resulting from]
2. exposure to a substance [relating to]
3. a process, trade or occupation in an industry.

This is analogous to the s. 3(1) causal scheme:

1. an injury [sustained by]
2. chance external event or gradual process [arising out of and in the course of]
3. employment

This neat schema for the causal relations in industrial disease cases does not address the meaning of the phrase "the disease is due to the nature of the employment" in s. 122. It is my view that this phrase is superfluous in light of the explicit causal scheme now found in the definition of industrial disease.

CONNECTION BETWEEN INJURY AND DISABILITY

Sections 40 and 45 clearly require that there be a causal connection between the worker's injury and disability for there to be entitlement to temporary disability benefits under s. 40 or entitlement to a permanent disability pension under s. 45.

It is, however, very common for the words "injury" and "disability" to be used interchangeably. What is the difference? The word injury in s. 40 and s. 45 refers to the "personal injury" in s. 3(1) discussed earlier. However, in s. 45(12), permanent disability is defined, for the purposes of s. 45, as:

> any physical or functional abnormality or loss, and any psychological damage arising from such abnormality or loss, after maximal medical rehabilitation has been achieved.

One might expect from this definition that temporary disability would be the same "physical or functional abnormality or loss and any psychological damage" prior to the achievement of maximal medical rehabilitation. Unfortunately, the statutory definition of permanent disability does not resolve the issue as much as one would expect. The major problem is that the statutory definition muddies the commonly held distinction between "impairment" and "disability" (See the preface to *Guides to the Evaluation of Permanent Impairment*, 2nd ed. (Chicago: American Medical Association, 1984)). An "impairment" is a physical or functional abnormality or loss. A "disability" relates the "impairment" to the person's ability to perform activities of work, daily living, leisure, etc., and the definition will depend on the context of its usage. In the context of workers' compensation, the term disability should measure the impact of a physical or functional abnormality or loss upon the person's ability to work.

Strangely, the Tribunal did not discuss the definition in s. 45(12) in its lengthy reasons in *Decision No. 915* (1987), 7 W.C.A.T.R. 1; nor did it discuss the difference between impairment and disability, which had been a significant point in the hearing (the Board

had changed the name of its group of pension assessors from Permanent Disability Medical Specialists to Permanent Impairment Medical Specialists shortly before).

Let us assume that the AMA view of disability is correct - that it means the impact of a physical or functional abnormality or loss upon the person's ability to work. Some important characteristics of disabilities are evident:

1. the severity of disabilities fluctuate over time;
2. the importance of various factors in the causation of a disability may fluctuate over time.

To illustrate the latter point, let us consider a common workers' compensation problem - the worker with pre-existing degenerative disc disease who injures his spine in an accident at work. Initially, the accident will normally be considered to have played a significant role in the worker's back disability. Over time, questions will often arise over the importance of the accident vis-a-vis the pre-existing condition in the ongoing back disability.

It is therefore misleading to speak of a "compensable disability" as the compensability of a disability may vary over time. It is, however, appropriate to speak of a disability being compensable over a certain period of time. In some situations, there may be no question about the causal relationship between the accident, the injury and the worker's disability. In these cases the phrase "compensable disability" may not be deceptive.

SUMMARY

The following causal schema for entitlement to benefits appears to apply in the "chance event" accident, the disablement and the industrial disease contexts:

1. a disability, resulting from
2. an injury [or a disease], by
3. a chance event, a gradual process or exposure to a substance [arising out of and in the course of]
4. employment.

While liberties have been taken with statutory language in the industrial disease sections of the Act, the schema in my view does fairly represent the causal links that must now be shown for entitlement to benefits to flow.

We often speak generically of the "causation issue". I hope that this article has helped clarify that in reality there are several causation issues. To my mind, it is desirable that, in the context of a case, the particular causal link in issue be identified.

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LA LOI SUR LES ACCIDENTS DU TRAVAIL ET LE SUICIDE

Gilles Renaud*

...Sa vue se brouille un peu, depuis quelque temps, et il entend moins bien. Les jambes surtout lui font de plus en plus défaut...Il n'a pas renoncé...renoncer, cela voudrait dire une décision formelle qu'il n'a pas prise, qu'il ne prendra sans doute jamais, qu'il n'aura jamais à prendre. Ce sont les choses qui ont décidé pour lui, et les gens, conduits par les choses...

(Trente Arpents, Ringuet)

INTRODUCTION

Tout comme pour le personnage de Ringuet, un ouvrier dont les rêves ont été détruits par la maladie, laissant une loque qui attend la mort dans l'amertume d'avoir tout perdu, la *Décision n° 298/88* (1988) (T.A.A.T.) nous décrit un travailleur qui est passé de la santé et du succès à la déchéance et à la mort, suite à un accident du travail. Sauf, que dans ce dernier cas, la mort était de sa main.

La *Décision n° 298/88*, la première décision publiée du Tribunal d'appel des accidents du travail portant sur la question du suicide, nous a révélé une situation de faits qui opposaient les deux théories reconnues à ce sujet, pour donner lieu à une théorie mitoyenne, à la fois simple et libre du carcan artificiel qui sous-tend les deux autres.

EXPOSÉ DES FAITS

Les faits en l'instance sont les suivants: le travailleur subit une blessure au genou en 1980. Suite à une intervention chirurgicale, il tente à plusieurs reprises de reprendre le travail mais sans succès, en raison de la douleur intense dont il souffrait et il quitte définitivement son emploi en 1982. Il se transforme alors d'un homme heureux et actif en un homme en proie à la mélancolie et à la dépression, qui croit que la Commission des accidents du travail ne désire pas lui venir en aide. Le jour de sa mort, il échoue dans sa tentative d'obtenir une réponse favorable de la Commission; quelques heures plus tard, après s'être plaint d'être devenu moins qu'un homme, il s'enlève la vie au moyen d'un coup de fusil.

La demande d'indemnités que présente sa succession est rejetée par la commisaire d'audience. Ce refus est donc porté en appel devant le Tribunal. Lors de l'audience, la partie patronale invoque le fait que l'ouvrier ne s'est pas tué sur le coup de la folie, résultat immédiat de la blessure qu'il a subie, mais plutôt après bien des années. La partie patronale fait valoir que ce suicide fut un geste volontaire, c'est-à-dire un résultat direct du libre-arbitre du travailleur blessé, ce qui a eu pour effet de briser la chaine de cause à effet entre la blessure et le décès. Comme l'a constaté le Tribunal, "si jamais le suicide est un acte raisonné, celui-ci l'était" (*Décision n° 298/88, à la page 6).*

D'autre part, il est question du fait que jamais le travailleur blessé fut diagnostiqué comme souffrant d'une maladie mentale. Cependant, il importe de souligner que le Tribunal a constaté que les éléments de preuve dévoilaient sans aucun doute l'existence d'une maladie mentale. Que plus est, le Tribunal a reconnu que cette condition était reliée à l'accident du travail qu'avait subi le travailleur. Ainsi, la douleur l'avait contraint à quitter son emploi et la perte de son emploi a entraîné la dépression et puis la maladie mentale.

LES THÉORIES PORTANT SUR LE SUICIDE

Le professeur Arthur Larson nous enseigne dans son ouvrage de doctrine magistral *The Law of Workmen's Compensation* (t. 1A, New York, Mathew Bender,

1985, n° 36.10), que la théorie classique portant sur la question du suicide est ainsi:

> At one time the field was dominated by the voluntary wilful choice test...under which compensation in suicide cases was not payable unless there followed as the *direct result* of a physical injury an insanity of such violence as to cause the victim to take his own life through an uncontrollable impulse or in a delirium of frenzy without conscious volition to produce death. [l'emphase est de moi]

Il poursuit en soulignant que cette théorie, bien que toujours valable à l'heure actuelle, se voit opposer de plus en plus souvent la théorie selon laquelle le suicide peut néanmoins donner lieu à un dédommagement si c'est l'accident de travail qui à entrainé l'état affectif affaibli qui, lui, est à l'origine directe du suicide. Il est à noter que l'élément important dans l'analyse du professeur Larson est l'état affectif.

LA THÉORIE QUI EST RETENUE

Le jury a rejeté ces deux théories, étant d'avis qu'elles sont arbitraires, en invoquant le principe reconnu à maintes reprises par le Tribunal que "the consequence of a compensable accident is itself compensable if the accident can be seen as a significant causal factor in the evolution of the consequence. (*Décision n° 298/88*, à la page 7). Ainsi, l'étude d'une demande d'indemnités fondée sur le suicide repose sur les mêmes principes que pour toute autre cause. C'est-à-dire que l'arbitre des faits doit déterminer le lien de causalité possible entre d'une part l'accident donnant droit à des prestations et l'incapacité qui en résulte et d'autre part l'évolution de la conséquence que l'on prétend maintenant être dédommageable. Le jury a craint que l'instauration définitive d'un critère se fondant sur "l'état d'esprit" du travailleur, suivant l'une ou l'autre des théories classiques, puisse faire obstacle à l'enquête la plus importante, à savoir le lien causal avec l'accident au travail. Cela ne signifie pas que l'on doit présumer que tout suicide consécutif à un accident du travail donnera droit à des indemnités. Cela ne signifie pas non plus que la conclusion que le suicide était intentionnel et volontaire ne peut, en une autre instance, revêtir une importance particulière.

CONCLUSION

Au demeurant, ce qui importe dans l'analyse ultime, c'est le principe du lien de causalité: dans quelle mesure l'accident du travail et ses conséquences ont contribué à la genèse de l'intention de porter fin à la vie. Dans le cas de ce travailleur particulier, le jury a conclu que sa succession était en droit de toucher des indemnités.

De toute façon, même si les théories classiques avaient été retenues, on aurait pu plaider avec succès qu'en raison de sa blessure, de sa perte d'emploi, de sa douleur et puis de sa maladie mentale, le travailleur blessé a cessé d'exercer le libre-arbitre, et que dans son cas aussi, "ce sont les choses qui ont décidé pour lui...".

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A CRITICAL LOOK AT A LEGAL APPROACH TO CAUSATION IN WORKERS' COMPENSATION

Gerald Zuk*

In the Volume 2, No. 2 edition of the Compensation Appeals Forum, a reader suggested, and the editors agreed, that an issue of the publication devoted to legal causation in workers' compensation matters would be timely.

Far be it from me to criticize an editorial decision of any publication. If I do not like what a publication does, then the best thing for me to do is not read it. However, I do want to criticize the trend in the workers' compensation system to refer to what the legal system does as regards causation or, for that matter, anything else, for assistance in decision-making. A workers' compensation publication devoting an issue to legal causation seems to me to be illustrative of this trend.

I am not saying that it may not be helpful in certain cases for the workers' compensation system to see what the legal system has done in similar situations. Obviously, there may be cases where it would be helpful. But what I am saying, is that the workers' compensation system generally does not need to refer to the legal system for help in deciding causation cases and generally should avoid doing so.

There are several sections of the *Workers' Compensation Act*, R.S.O. 1980 c. 539, which do have a bearing on deciding causation: the definitions of accident and industrial disease, the requirements that in order for a claim to be allowed, the worker must suffer personal injury by accident and the accident must arise out of and occur in the course of the employment, the presumption clause, the benefit of the doubt principle, the Industrial Disease Schedule, Reg. 951 R.R.O. 1980, Schedule 3, and the requirement that any workers' compensation decision be on the real merits and justice of the case.

There recently has been much hair-splitting about the meaning of the term "personal injury by accident" and the application of the presumption clause. Many legal precedents have been cited to advance a particular point of view. But surely, if the intent of the workers' compensation system is to provide compensation to victims of industrial accidents and diseases, the basic test of whether or not a worker has entitlement to compensation is whether or not the disablement is work-related. Do we really need to know what someone in the House of Lords or in a court somewhere might have said about causation in order to apply this test?

I am not suggesting that the workers' compensation legislation is perfect. I believe, for example, that the case for an improved Industrial Disease Schedule is overwhelming. But what I am suggesting is this. First, the legislation necessary to decide causation cases already exists. Secondly, each case should be decided on its own merits and it is not necessary to refer to legal precedents.

It may be argued that legal precedents may be especially helpful in deciding certain types of cases, for example if there is a question of how much of a worker's disablement is related to employment factors and how much is related to non-employment factors. Again, I would respond by saying that each case should be decided on its own merits. (In this particular type of case, from a common sense standpoint, if the contribution of the employment to the worker's disablement is only minimal, then the worker should not be awarded compensation for the disablement. There should be two principles in workers' compensation that are beyond argument. One is that workers should get whatever compensation they are entitled to. The other is that they should not get any compensation they are not entitled to).

It may also be argued that many of the policies of the Workers' Compensation Board and perhaps even of the Workers' Compensation Appeals Tribunal respecting causation somehow create difficulties for the deciding of causation cases - just what kinds of difficulties they create depends on who is saying that

they do - and that one way to help correct this problem is to adopt some of the principles for deciding causation that have been established in the legal system.

No doubt many criticisms of these policies could be made. For example, as a worker advocate, I would maintain that the policies of the Workers' Compensation Board for determining whether or not hearing loss is work-related are arbitrary and discriminate against workers. But I would also maintain that the shortcomings of these policies merely demonstrate the need for better policies, not a need to rely on the legal system.

Besides the fact that we already have workers' compensation legislation and policies in place to assist in deciding causation cases, whatever their shortcomings, I want to offer some other reasons why a legalistic approach to deciding causation cases should be avoided.

First, the more attention that is focused on the legal issues involved in a case, the more potential there is for attention to shift away from the evidence of the case. In other words, legal issues can actually act to obscure the true nature of the case. Again, the purpose of the decision-making process in any causation case is to decide, on the merits of the case, whether or not the disablement is really work-related.

Secondly, the legal system in any causation case looks to find fault. It is concerned with which person's actions caused the other person's disablement. The workers' compensation system, it hardly needs to be said, is supposed to be a no-fault system where the main consideration is whether or not the disablement is work-related. It is true that worker advocates are inclined to argue that really the work is at fault in every case of disablement that ever occurs, while employer advocates are inclined to argue the opposite. However, since work is not the same thing as a person or employer, the workers' compensation system does not really assign fault in the same way that the legal system does. Thus each system starts from a different premise which, in theory at least, renders the approach it uses in determining causation invalid for use in the other. It might also be argued that if the workers' compensation system parallels the legal system too much, there is a danger that the no-fault quality of the workers' compensation system could be diminished or lost altogether, which would not be to anyone's advantage.

Thirdly, the trend toward making the workers' compensation system more legalistic makes it harder for anybody but lawyers to participate effectively in it. To the lawyers, this may be a good thing, but to anybody else it is not. And especially it is not for workers, who are the people most affected by what the system does. If a worker is having a difficult time getting compensation to which he really is entitled, then he goes to an appeal hearing either unrepresented or with only a layperson as a representative and the employer in the case has a lawyer who can recite all kinds of legal precedents and advance all kinds of legal arguments as to why compensation should not be awarded, that worker will be at a disadvantage. We may hope and trust that the decision-makers would decide the case on its own merits, but it would be hard for them not to be influenced by the legalistic arguments.

Finally, making the workers' compensation system more legalistic ultimately will make it more remote to the average person. There is already considerable acrimony between the Workers' Compensation Board and its constituencies. There is also growing resentment of the way the Workers' Compensation Appeals Tribunal allows legalisms to creep into its proceedings. If the decision-makers in the workers' compensation system adopt even more legalistic approaches to decision-making, such as a legalistic view of causation, then it is to be expected that the system will become even more distant to its clientele and there will be greater hostility towards it. It is inconceivable that this would be to anyone's benefit, except perhaps for a few lawyers.

I do not want to leave any impression that deciding causation cases is easy. These cases present some of the most problematic issues in workers compensation. But if the decision-makers in the system accept that often it is not possible to determine with certainty whether or not one thing is the result of another and decisions about relationships between two things have to be made in the context of what is more probable than not, then the decision-makers may not be so inclined to turn to the legal system for easy solutions to difficult problems, and this will be to the benefit of everyone involved in the system.

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WCAT ON THE NEW FRONTIER - STRESS AND OCCUPATIONAL DISEASE

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INTRODUCTION

Since its establishment in 1985, the Workers' Compensation Appeals Tribunal (the Tribunal) has had a significant impact on the workers' compensation system. There has been a perception that some of the Tribunal's decisions have taken the system in new directions - and have even "opened the floodgates" to new areas of entitlement. Among the key decisions noted in this regard have been *Decision No. 72* (1986), 2 W.C.A.T.R. 28, which dealt with the definition of "injury by accident"; *Decision No. 915* (1987), 7 W.C.A.T.R. 1, which dealt with the recognition of chronic pain; and most recently *Decision No. 918* (1988), the leading decision on occupational stress.

In this paper, two important areas of the "new frontier" of workers' compensation are analyzed - stress and occupational disease - to determine what approach the Tribunal is taking and what this means to the practitioner. Then, a brief attempt is made to evaluate whether the perceptions about the Tribunal are justified.

THE TRIBUNAL

The Tribunal is a key component of the new administrative and appeal system introduced by the 1984 Bill 101 amendments to the *Workers' Compensation Act* (the Act), which came into force on October 1, 1985. Prior to Bill 101, workers' compensation in Ontario was administered by the Workers' Compensation Board (the Board), which collected the assessments, set the policies, adjudicated on claims, and heard appeals from lower level decisions. The highest level of appeal in the system was the Appeal Board, which was internal to the Board's own structure. The only recourse in the case of a negative Appeal Board decision was to the courts by way of judicial review or to the Ombudsman.

Practitioners from both the worker and employer sides would probably agree that the Appeal Board was unsatisfactory, from a number of viewpoints. It tended to defer to Board doctors on medical and scientific issues. It seemed incapable of dealing with complex issues and arguments. The reasons for its decisions were often unclear or illogical - and sometimes entirely absent. The Appeal Board tended to apply existing Board policies and not be open to new interpretations. In general, the Appeal Board was not dealing well with the cases which came to it. Over the years, criticism grew, to the point that the need for an independent appeal body was widely recognized.

Bill 101 thus created a new, independent Appeals Tribunal, along with a semi-tripartite Board of Directors for the Board; Offices of the Worker and Employer Adviser to advocate for workers and employers; and the Industrial Disease Standards Panel, to make recommendations to the Board on industrial disease entitlement criteria.

The Act gives the Tribunal exclusive jurisdiction over determinations regarding rights of action (s. 15) and employer-directed medical examinations (s. 21) and a form of summary appeal jurisdiction over disputes regarding access to worker claim file material (s. 77). The main work of the Tribunal, however, comes from its exclusive jurisdiction to deal with worker and employer appeals from final decisions of the Board regarding claim or assessment matters (ss. 86g(1)(b) & (c)). On leave, appeals may also be

made from decisions of the former Appeal Board (s. 86o). Tribunal decisions are subject to review by the Board's board of directors, pursuant to s. 86n, where the Tribunal decision turns on an interpretation of the policy and general law of the Act. It has not yet been determined which body has the final say when this review process is invoked.

The Tribunal has developed the capacity to deal with a number of important issues at the same time, with a high degree of sophistication. Much of that capacity comes from the activities of the Tribunal Counsel Office which takes an active (and sometimes controversial) role in leading cases, and from the use of outside medical expertise, pursuant to s. 86h of the Act. The Tribunal has recruited a number of workers' compensation experts as vice-chairs and side members. Tribunal decisions are generally well written and reasoned and the decision-writers pay close attention to the development of the Tribunal's own jurisprudence.

It seems that the Tribunal is moving from an activist, investigative and agenda-setting role in its initial three years into a more traditional administrative tribunal model, as its jurisprudence matures. Many of the seminal issues have been dealt with and decisions now often turn on the elaboration of general principles and lines of interpretation developed earlier. It is thus an ideal time for the worker and employer communities to contribute to the development of that jurisprudence, without the pressures of the early years.

THE LEGAL BACKGROUND FOR STRESS AND OCCUPATIONAL DISEASE

The recognition of stress and occupational disease claims involves the "entry points" to workers' compensation entitlement under the Act. The key entry point is s. 3(1), which provides for entitlement to benefits where "personal injury by accident arising out of and in the course of employment is caused to a worker". Section 1(1)(a) defines "accident" to include:

> (i) a wilful and intentional act, not being the act of the worker,
> (ii) a chance event occasioned by a physical or natural cause, and
> (iii) disablement arising out of and in the course of employment.

Section 3(3) provides for a rebuttable presumption that the accident occurred in the course of employment, where it arose out of the employment, and vice versa where the accident occurred in the course of employment.

For occupational disease (termed "industrial disease" in the Act), there is s. 122(1). It provides that, where a worker suffers from an industrial disease and is thereby disabled or dies, and the disease is "due to the nature of any employment in which he was engaged", the worker is entitled to compensation "as if the disease was a personal injury by accident and the disablement was the happening of the accident". Section 1(1)(n) defines industrial disease to include:

> (i) a disease resulting from exposure to a substance relating to a particular process, a trade or occupation in an industry,
> (ii) a disease peculiar to or characteristic of a particular industrial process, trade or occupation,
> (iii) a condition which "may be a precursor to an industrial disease", which requires that the worker be removed temporarily or permanently from exposure to a substance, or
> (iv) any of the diseases mentioned in Schedule 3 or 4.

The "schedules" referred to are established under the authority of s. 122(16) which allows the Board, subject to the approval of the Lieutenant Governor in Council, to declare any disease to be an industrial disease and add it to a schedule. Diseases mentioned in Schedule 3 are rebuttably presumed to have been due to the nature of the listed employment; diseases mentioned in Schedule 4 are "conclusively" presumed to have been due to the nature of the employment. The Board has not yet placed any diseases in Schedule 4, which was established by the Bill 101 amendments in 1985 - although the Industrial Disease Standards Panel has recommended that two asbestos diseases be placed in that schedule.

Finally, s. 86p establishes the Industrial Disease Standards Panel, appointed by the Lieutenant Governor in Council to investigate possible industrial diseases; to make findings as to whether a probable connection exists between a disease and an industrial process, trade or occupation; to develop criteria for the evaluation of industrial disease claims; and to advise on eligibility rules for compensation for industrial disease claims. Section 86p provides that the Panel shall report its findings to the Board, with notice to the public and an opportunity for submissions from the public to the Board. The Board is not bound to accept the Panel's findings, but must publish its reasons for acceptance or rejection in the Ontario Gazette.

Regarding occupational stress, in particular chronic mental stress, the key provision is the "disablement" part of the definition of accident. Regarding occupational disease, this provision is also important,

because much occupational disease is caused by chronic exposure of some kind, and the line between "disablement" and "industrial disease" is often a fine one.

OCCUPATIONAL STRESS

It is interesting that occupational stress, for an issue arousing such controversy, is actually the subject of very few Tribunal decisions. In addition, some of these decisions deal with an area where compensability has long been recognized by the Board - unusual episodes of stress/exertion leading to heart attacks. In this paper, the issues around heart attacks are not examined. Neither does this paper deal with compensation for disability resulting from incidents of a clearly psychotraumatic nature, such as witnessing the death of a co-worker, or being the victim of a hostage-taking, where the Board has also historically been willing to grant entitlement. The focus is on chronic occupational stress, which the Board's Director of Medical Services stated in the file under review in *Decision No. 918*, "has never been accepted as a compensable condition" (*Decision No. 918*, majority reasons, p. 3). In the American jurisprudence, this form of stress disability is referred to as "mental-mental" stress - mental disability resulting from mental stress.

Decision No. 918 was not the first Tribunal decision where the appellant raised the issue of the compensability of occupational stress. *Decision No. 357* (1986), which dealt with "teacher burn-out", seems implicitly to have recognized the compensability of a disability resulting from stress; however, on the Panel's view of the facts in that case, entitlement was denied. There, the Panel determined that the teacher's psychological condition (paranoid schizophrenia) was not the sort of condition which would be expected to result from "burn-out".

In *Decision No. 828* (1987), entitlement was granted on a "disablement" basis (s. 1(1)(a)(iii)) for inflammation of the larynx and chronic laryngitis, where part of the causation mechanism identified was working in a stressful environment (Hansard operator); however, there the worker was also subjected to physical irritants (projecting her voice for extended periods of time in a smoky environment). In *Decision No. 416* (1987), entitlement was denied for hypertension and psychological disorders allegedly resulting from exposure to high noise levels. In *Decision No. 50/88* (1988), the worker made a claim for psychological problems resulting from harassment by workmates regarding the worker's hairline. The Panel declined to rule on the legal issue of the compensability of such a "stress" disability, because in the Panel's view the evidence did not show that the alleged harassment had contributed significantly to the disability in any case.

Prior to *Decision No. 918*, then, no Tribunal decision had dealt in depth with the legal issues regarding the compensability of stress; and in only one of the decisions involving stress (in combination with other factors) was the worker successful.

Decision No. 918

In *Decision No. 918*, the key issues around the compensability of stress were canvassed. The majority decision (Vice-Chair and employer member) recognized the compensability of stress under the Act but denied it, on the evidence, to the worker appellant. The dissenting worker member agreed with the majority on the broad principles of compensability (although cautioning them on a key point) and would have allowed the appeal on her view of the evidence.

The case involved a telephone operator who had worked for five years on a type of switchboard known as a cord board, and then for six years on an electronic switchboard. The operator claimed that the increased stress on the electronic board, including a heavier workload and more monitoring, resulted in a disabling psychological condition for an 11 month period in 1984-85. The Board's Appeals Adjudicator had denied the claim, relying in part on the comments of the Board Medical Director cited earlier. The Tribunal was thus placed in the situation of deciding the threshold question of whether there was a legal basis for awarding compensation for mental stress.

Industrial disease or disablement

The majority considered two alternative possibilities for compensability - industrial disease or "disablement". Dealing first with the industrial disease route, the Panel noted that some American jurisdictions had awarded compensation for stress on this basis. However, the majority concluded that the words "peculiar to or characteristic of" in the s. 1(1)(n)(ii) definition "carry with them a requirement that the disease be linked in a general and special way to the industrial process, trade or occupation" (majority reasons, p. 4). In the majority view, this would require studies establishing a statistical relationship between the employment and the disease. Given the complexity of the analysis, the majority preferred to leave this sort of matter to the Industrial Disease

Standards Panel, which has a specific mandate to "make findings with respect to the connection between diseases and industrial processes". The majority thus rejected compensability under the rubric of industrial disease.

The employer had argued that the worker's psychological condition being a "disease", could be compensated only under the industrial disease provisions, and that if the claim failed there, the "disablement" provision was not available as an alternative. The majority did not accept this submission finding that there is no "legal impediment to establishing entitlement to compensation for a mental disability that results from stress at work" (majority reasons, p. 5).

The majority then went on to note that the problem with stress cases was the multitude of non-work sources of stress and the resulting difficulty of determining which stressors contributed to the development of a psychological condition. The majority stated that in principle the approach taken should be the same as that accepted by the Board for the causation of other compensable disabilities - whether the compensable cause was a significant contributing factor to the disability. In stress cases, given the inevitability of concurrent non-work-related influences, the majority felt that "the evidence concerning the role of the workplace injuring process in the development of the disability...*must be especially clear*" (majority reasons, p. 6, emphasis added).

Following a review of the evidence of the worker, manager, and union witness, the majority determined that the work was stressful, but that there was, from an objective perspective, no greater stress on the worker than on his co-workers (majority reasons, p. 10). The majority then set out the three conditions for entitlement in the case before it:

- Did the worker suffer from a disability during the period under appeal?
- Was this disability compatible with the conditions of employment?
- Were the conditions of employment a significant contributing factor to the disability?

The majority accepted that the worker was disabled during the appeal period as a result of anxiety and depression, although it was not a total disability for the entire period. The majority also accepted that anxiety and depression are conditions which *could have been* caused by exposure to stress.

The difficult question was whether job stress was a significant contributing factor to the disability. The majority repeated its view that, in stress cases, the stress must "stand out" as an important cause of the disability, as against non-work stressful events (majority reasons, p. 12). The majority was particularly concerned about the difficulty of investigating all the possible non-work stress factors - such as childhood events or marital problems - and agreed with the concern expressed about this in *Decision No. 102* (1975), 2 W.C.R. 25 (B.C.).

The majority turned to the American jurisprudence for assistance, first reviewing a study of stress claims done in 1985 by the National Council on Compensation Insurance. This study documented a range of state responses to "mental-mental" stress claims - from absolute non-recognition to recognition on the same basis as other claims. The Panel approved of and adopted the approach of the Supreme Court of Maine, in the case of *Townsend v. The Maine Bureau of Public Safety*, 404 A2d 1014 (ME), which the Tribunal read as establishing a two-stage enquiry regarding stress cases:

> 1) to compensate disabilities resulting from stress demonstrably greater than expected by the average worker;
>
> 2) to grant entitlement in a particular case where the workplace stress is not unusual, "provided that it can be shown by clear and convincing evidence that the ordinary and usual work-related pressures in fact predominate in producing the injury" (majority reasons, p. 16).

The majority was of the view that this approach struck a balance between the tests which had been developed in the American jurisprudence. It is interesting that the Maine court itself, in the quoted reasons, had seen the two-stage approach as allowing "adequate safeguards to shield the employer", because the evidence required in a case of ordinary work-related stress had to be "clear and convincing" (majority reasons, p. 15).

The majority then proceeded to apply this two-stage enquiry to the evidence before it, beginning the process with the statement that the test to be applied at both stages was an objective, and not a subjective one. This is an important distinction because the subjective test would have greatly expanded the potential coverage for stress.

The majority thus first considered whether the worker's job was one with higher stress than that in "everyday life and employment". Comparing the worker's job with that of an air traffic controller, the majority concluded that it was not satisfied on the evidence that "the level of stress experienced by this worker in his job was significantly different than the usual level of stress encountered in everyday

employment life" (majority reasons, p.17).

This brought the majority to the second stage - whether there was "clear and convincing" evidence that the condition was "in fact predominantly attributable to the not unusual degree of stress in his employment". This required, according to the majority, a review of the medical evidence and in the end a determination by the Panel of whether the workplace stress was a significant contributing factor. The majority found that it had been shown, on cross-questioning, that the worker's psychiatrist had not taken sufficient account of important non-work factors in the causation of the psychological condition - the illness of the worker's mother due to cancer, the fact that he had not seen his children in 20 years, the absence of a male-female relationship for 15 years, the lack of social contacts, and the fact that the worker had quit each of his previous jobs for personal reasons. The majority concluded that "the presence of these personal stressors and the absence of unusual workplace stress makes it impossible for us to conclude that the workplace stress 'stands out' in contributing to the worker's disability" (majority reasons, p. 19).

The worker member, in a strong dissent, accepted the majority's "two point test" for adjudicating stress cases, but went on to review the evidence in a much different light than that given by the majority. The worker member found that the appellant worker's job did cause "stress significantly different from the usual level of stress encountered in every day life or employment" (dissent, p. 6). In the view of the worker member, the Panel should also have gathered more evidence on its own, given the precedent-setting nature of the case. The worker member also questioned whether the majority's requirement of "especially clear" evidence raised an impossibly high standard. She argued for the use of the conventional civil burden of proof - the balance of probabilities.

Finally, the worker member reviewed the psychiatric evidence, and differed with the weight placed by the majority on the non-work causes of the worker's disability. She felt that the work causes were the substantial contributors to the disability. In her analysis, the worker's claim satisfied both points of the test set out by the majority.

Comments

In both its view of the law and of the evidence in the case, *Decision No. 918* is a relatively cautious venture into the "new frontier" of occupational stress. The recognition of the theoretical compensability of stress is balanced by a conservative approach as to the extent of that recognition. The reluctance to use the industrial disease route means that *Decision No. 918* does not set a precedent for the telephone industry (or similar industries) of nearly as much weight as would an industrial disease finding. The two-point test for stress entitlement is in itself theoretically appealing, but the requirement for "clear and convincing" evidence seems to run counter to the use of the balance of probabilities in entitlement decisions on other matters. This approach is particularly puzzling in light of s. 3(4), which requires that in determining *"any claim"* under the Act, "the decision shall be made in accordance with the real merits and justice of the case and where it is not practicable to determine an issue because the evidence for or against the issue is approximately equal in weight, the issue shall be resolved in favour of the claimant" (emphasis added).

It is difficult to assess any panel's view of the evidence only from reading a decision. However, it could certainly be said that the worker member appears to have raised substantial evidence supporting her view of compensability, and that the majority has set a stiff test for stress entitlement.

Finally, it is of some significance that in the very decision recognizing the compensability of stress, the Tribunal did not grant entitlement to the individual appellant.

Decision No. 1018/87

In February 1989, the Tribunal rendered another important occupational stress decision, *Decision No. 1018/87*. Although once again entitlement was denied to the appellant worker, *Decision No. 1018/87* seems to support a less stringent entitlement test than *Decision No. 918*.

In *Decision No. 1018/87*, the Panel was faced with a complex medical situation. The worker had been employed for over 20 years in a clerical position. He suffered from significant pre-existing anxiety and gastro-intestinal problems, including colitis. In addition, he had two non-compensable accidents and a severe case of non-compensable sunburn during the time under review.

The worker's appeal was based on a claim of stress resulting from harassment by the employer regarding various job changes, combined with "job dislocation" in a company-wide situation of workforce reduction, job displacement and the exercise of "bumping" rights. At the same time, the worker was subject to non-work stress related to his wife's chronic illness and the deaths of friends.

Most of the decision is devoted to a careful review of this complex fact situation. The Panel also discussed at some length the legal issues around compensation for stress-related disabilities.

Decision No. 915 (the leading decision on chronic pain and permanent disability) was cited as authority for the compensability of non-organic disabilities, and the application of the "thin-skull doctrine" in particular. The Panel noted that, although the "thin-skull" approach applied, "where the pre-disposition was so large a factor in causing the subsequent disability that it reduced the role of the industrial injury to insignificance in the overall scheme of things the ensuing disability would be non-compensable..." (at p. 20).

The Panel also found useful the analysis of Lawrence Joseph, an American lawyer, in a law review article on causation in mental disability cases. The article highlighted the inherent difficulties of adjudicating such cases, as contrasted to those involving physical injuries. The Panel noted the author's views that even tests such as "unusual stress" do not guarantee causation, but rather, "as a 'badge of reliability', engender confidence" (at p. 21).

In commenting on *Decision No. 918*, the Panel stated that, although it understood the adjudicative difficulties which led to the introduction of a "predominance" factor in cases of "ordinary" stress, this approach should "not be taken as far as creating a higher standard for some types of cases than others". The Panel reaffirmed that "In the end...one must decide whether the evidence is persuasive on the balance of probabilities that work was a significant contributing factor to the stress disability in the particular worker, as one would do with any other type of disability (at p. 21). This is a very important clarification of the approach taken in *Decision No. 918*.

In reviewing the evidence, the Panel rejected the allegation of harassment. The Panel also concluded that the job dislocations had not contributed significantly to the worker's disabilities. A report favourable to the worker's claim, from a psychiatrist who had recently seen the worker for the first time, was given less weight than contemporaneous medical reporting. The Panel clearly saw the "serious pre-existing condition" as the main factor in the disability.

Comments

Decision No. 1018/87 stands for the proposition that entitlement to compensation for chronic stress is to be adjudicated on the same basis as any other workplace "disablement". This seems to be the correct legal position. The decision also reinforces the Tribunal's approach of carefully scrutinizing the evidence in such cases, to ascertain whether there is significant occupational contribution to the disability. Although the legal test could be seen as more "liberal" than that in *Decision No. 918*, there is little sign that the "floodgates" have been opened.

OCCUPATIONAL DISEASE

The Tribunal's jurisprudence regarding occupational disease is much more extensive than that for stress. A number of the elements in the legal analysis of stress in *Decision No. 918* are present as well in the Tribunal's approach to occupational disease. Because of the extent of the jurisprudence, more practical information is available for the practitioner regarding the approach taken to causation and the weighing of evidence.

Legal issues

Industrial disease or disablement

In general, as in *Decision No. 918*, the Tribunal has preferred to consider entitlement for occupational disease by way of "disablement" rather than by making explicit findings that a condition is an "industrial disease" as defined by the Act. In *Decision No. 850* (1988) which dealt with asthma, allegedly resulting from exposure to formaldehyde, the Panel noted the following about the kind of enquiry required to make an industrial disease finding (at p. 14):

> In our view, it is a matter of significant complexity to decide whether a disease is peculiar to a particular process, trade or occupation. The extent of the complexity was explicitly recognized by the Legislature when, in 1985, it established the Industrial Disease Standards Panel. The purpose of that organization is to investigate possible industrial diseases. The Panel's mandate is to make recommendations on the establishment of new industrial diseases.
>
> ... In our view, it would require an exceedingly complex medical and scientific analysis to establish the peculiarity of asthma to a particular exposure.

The Panel then expressed its unwillingness to conclude on the evidence before it that the worker's asthma was peculiar or characteristic of exposure to formaldehyde.

The *Decision No. 850* Panel went on to examine the disablement provision. Although the historical introduction of s. 1(1)(a)(iii) to the Act was seen to

have been related to the compensation of repetitive strain disabilities, the Panel was of the view that the provision is not limited to matters of that nature. Instead, the disablement definition can be used whenever there is a gradual onset of symptoms, whether in the nature of repetitive strain or disease (at p. 15). The Panel noted that "the effect of proceeding by way of disablement is that the decision will not have general application...(because)...we would not be drawing the kind of general relationship between asthma and exposure to formaldehyde that would be the case if we concluded that asthma from formaldehyde exposure was an industrial disease" (at p. 15).

The analysis used in *Decision No. 850* was approved and applied in *Decision No. 1296/87* (1988), which used the disablement route to grant entitlement to a chrome-plating worker for lung cancer.

A further elaboration of this approach, with a more extensive analysis of the key entitlement provisions, was made in *Decision No. 559/87* (1988). In that decision, which dealt with the relationship between whole body vibration and degenerative disc disease in truck drivers, the Panel took a practical view of the meaning of the legal provisions. The Panel decided that the term "disease" was not restricted to medical conditions which a doctor would ordinarily call "diseases", but rather referred more generally to an "injuring process that leads to a disability" (at pp. 37-38). In the Panel's view, this approach was the same as that taken by the Board itself, in particular in the listing of conditions and exposures found in Schedule 3.

The Panel in *Decision No. 559/87* took a similar approach to the meaning of the term "disablement" in s. 1(1)(a)(iii), stating that it too referred to an "injuring process", and encompassed all the injuring processes apart from those in s. 1(1)(a)(i) and s. 1(1)(a)(ii) (at p. 40). The Panel stated that it was preferable wherever possible to avoid the need to worry about the disablement/disease distinction, and agreed with the majority in *Decision No. 918* that the definition of "disablement" was quite broad enough to include "diseases".

The Panel then carefully reviewed the extensive evidence before it on the relationship between long distance truck driving and degenerative disc disease, using a two-stage enquiry:

- first, to determine whether there is an "injuring process" which is "peculiar to or characteristic of the long-distance truck driving occupation";
- secondly, whether there was sufficient evidence to establish what amount of exposure is required before the damage is done.

The Panel was satisfied on the first ground - that there was an "injuring process" peculiar to long-distance truck driving. However, the Panel did not feel that it had enough evidence before it to establish the length or nature of exposure before the risk becomes significant. This second type of enquiry was seen as better handled by the Industrial Disease Standards Panel. Entitlement on an industrial disease basis was thus ruled out (at pp. 42-43).

The Panel went on to determine that, while there was insufficient evidence to prove that the worker's condition was directly caused by his work, the evidence did establish a "probable causal relationship" on the basis that the truck-driving "aggravated an underlying and pre-existing condition...or some other pre-existing susceptibility" (at p. 44).

Decision No. 559/87 is a particularly useful example of the careful analytical approach taken by the Tribunal to the legal and factual questions regarding causation of workplace disability.

Other cases in which entitlement was granted on the basis of disablement rather than occupational disease are *Decision No. 93 (1986)* (bilateral follicular conjunctivitis in a welder) and *Decision No. 214/88* (1988) (aggravation of pre-existing xerostomia - dryness of the mucous membranes - by "sealed building" problems).

From the key decisions outlined above, the practitioner must be aware that the Tribunal will be very reluctant to declare that a particular medical condition is an "industrial disease". The preferred approach will be that of "disablement". This means that even if a previous Tribunal decision has allowed entitlement for the same medical condition, the evidence in the new case will have to be carefully scrutinized to ascertain whether the case can be established as a disablement. In particular, the practitioner must have specific medical evidence linking the disability of his/her client to the occupational exposure. Extensive medical or occupational health literature will not suffice if the link in the specific case cannot be established.

Although this approach by the Tribunal can be seen as an effort to direct new occupational disease issues through the Standards Panel, it does pose serious problems to the worker community, where numerous similar cases must be separately appealed as "disablements" while months (and years) pass in the process of determining whether these are occupational diseases.

The practical approach to the "disease/disablement" distinction is useful, however, in that it allows practitioners to get at the real causation issues without worrying about artificial and legalistic hair-splitting.

The test for causation

It is now well established that the test for causation is whether the occupational exposure made a "significant contribution" to the disability. As with stress cases, it is common in the occupational disease situation for there to be a number of possible causes for the disabling condition; for example, smoking and occupational exposure in lung cancer. The Tribunal has thus had to draw some difficult lines, sometimes in cases of very serious disability, in determining "significant contribution".

A useful example of the Tribunal's approach is *Decision No. 1296/87* (1988). In that decision, the Panel determined that the relative risks of lung cancer from exposure to "chromium VI" and from smoking were roughly comparable (although the Panel emphasized that this was a conclusion reached only for the purposes of that specific case). Thus, "there were two comparable significant causative factors", and entitlement was granted to the worker because "the worker's exposure to chromic acid was one significant causal factor in the development of his lung cancer" (at p. 12).

In *Decision No. 93*, the Panel had to determine whether the worker's conjunctivitis came from allergies or from work exposure to smoke and dust as a welder. In accepting the condition as a disablement, the Panel determined that "Whether or not the work was the sole cause of this disability is not critical in the determination of entitlement to benefits. It is simply necessary for the work to be a significant contributing factor in the onset of the disability." (at p.3).

Cases in which the occupational exposure was held *not* to be a significant contributing factor include *Decision No. 319* (1987), 4 W.C.A.T.R. 144, where workplace exposure to dust and smoke as a miner was found to have been "an irritant or a minor contributing factor", whereas the worker's pre-existing condition and 15 years of smoking were the "significant causes" (at p. 4). In *Decision No. 138/87* (1988), the Panel determined that the evidence for a relationship between non-sinter plant work in nickel mines and lung cancer was "equivocal at best", whereas the link to smoking was well established, and thus denied an appeal for entitlement for lung cancer.

Closely related to the question of significant contribution are those of individual susceptibility or aggravation of a pre-existing condition. The "thin-skull" theory was well established in workers' compensation law, as in tort law, and the Tribunal's decisions reflect this. In *Decision No. 596/87 (1987)*, for example, the Tribunal accepted a claim for lung problems on an aggravation basis, even though the worker had been a heavy smoker. In *Decision No. 850*, the formaldehyde/asthma case discussed earlier, the Tribunal specifically stated that a particular susceptibility does not bar entitlement (at p. 6).

The principle of "significant contribution", and the allowance for entitlement on an aggravation basis, are not new to workers' compensation. What the Tribunal has done is to state well-established approaches in more "legal" language. What is important for the practitioner is that it is insufficient to bring hypothetical or possible causation theories before the Tribunal. The Tribunal will be looking for evidence which, on the balance of probabilities, establishes a link between the workplace exposure and the medical condition which allegedly resulted from it. As is discussed below, the Tribunal will be looking at the proposed causation theory with a high degree of precision and analysis.

Attitude to Board policy

The Board has developed detailed policies and guidelines regarding a number of occupational diseases. In fact, in the past three decades, this has been the Board's preferred method of dealing with occupational disease - as opposed to adding new diseases to Schedule 3. Although the Tribunal has been willing to depart from historical Board approaches - witness the results in *Decision No. 918* and *Decision No. 559/87* - it is also clear that substantial weight is given to Board policies.

In *Decision No. 490* (1987), 4 W.C.A.T.R. 198, for example, a white finger disease case where the worker's exposure to vibrating tools was under that required in the Board's guidelines, instead of simply departing from the policy, the Tribunal Panel used paragraph 5 of the Board Directive, which allowed the individual circumstances of the case to be taken into account, as the basis for allowing the appeal.

Generally, the practitioner should be aware that the Tribunal will wish to see substantial evidence in an individual case to justify deciding the case on the basis of "individual circumstances" or departing entirely from an established Board policy or guideline.

The use of the Schedule 3 presumption

Section 122(9) provides for a rebuttable presumption of compensability in the case where the worker "was employed in any process mentioned in the second column of Schedule 3 and the disease contracted is the disease in the first column of the Schedule." The "diseases" in the first column include "poisoning and its sequelae" from a number of toxic substances.

The Tribunal, in *Decision No. 421/87* (1988) has adopted an interpretation regarding the standard to be

met in rebutting this presumption, similar to that adopted regarding the rebuttal of the s. 3(3) presumption of compensability in the case of s. 1(1)(a)(i) and (ii) accidents: on the balance of probabilities, it must be shown that " the disease was not due to the nature of...(the) employment" (at p. 10). In that case, the issue was whether the worker's symptoms resulted from mercury poisoning or the normal ageing process. After reviewing the evidence, the Panel was "not satisfied that there is sufficient evidence to find...that natural ageing is the *significant causative factor* in the worker's condition" (at p. 12, emphasis added), and thus the presumption had not been displaced.

Decision No. 963/87 (1987) took a similar approach, in a case of phosphoric poisoning.

It is important to note that there must be some evidence of symptoms consistent with the scheduled substance, to bring the presumption into play in the first place (see *Decision No. 421/87*, p. 10).

There are several instances in which a disease is listed in column 1 of the Schedule, with no corresponding exposure listed in column 2 (e.g., teno-synovitis, the pneumoconioses other than silicosis, disease due to exposure to X-rays or radioactive substances). It has been unclear how the presumption would operate in these situations. In *Decision No. 484IM* (1988), the Panel disagreed with the submission of the worker, in a teno-synovitis case, that the presumption applied. In the Panel's view, both a disease *and* a process had to be present for the presumption to come into play. The Panel stated that the listing of a disease *without* a process "simplifies the task of meeting the definition in section 1(1)(n). There is a recognition, by listing a disease...that it arises frequently in the industrial context, as opposed to generally in the population at large" (at p. 5).

It is important to note that the scheduling of a disease, although it is of assistance in proving the worker's case, does not relieve the practitioner from introducing sufficient evidence to bring the presumption into play. It will also be necessary in many cases to examine closely the evidence to the contrary, and meet it if necessary with expert evidence. Many worker representatives would disagree with the view taken in *Decision No. 484IM*, but as long as it is followed by the Tribunal, entitlement for conditions listed without processes will have to be proved in the ordinary way, without the aid of the presumption.

Evidentiary matters: Proving your case

Workers' compensation cases, especially those which turn on initial entitlement, sometimes involve complex issues of causation. This is particularly true of occupational disease claims, where the cause is often a long term exposure to one or more substances, with lengthy latency periods before the resulting disability arises. The practitioner in such cases will often have to become an expert in a narrow area of occupational medicine, in order to determine the best line to take in the case, and the appropriate questions to ask experts. There is no substitute for medical research on the particular facts of the case, but Tribunal decisions can be very useful as starting points in a number of areas; indeed, some of them have bibliographies appended.

Broadly speaking, the practitioner will have to bring forward evidence regarding three main issues in an occupational disease case:

- Was there exposure to a harmful substance or process? And, what was its extent?
- Is there medical or occupational health literature generally linking exposure to the sort of medical condition from which the worker suffers?
- Did the medical condition in this particular case result from the exposure?

Evidence of exposure

Many occupational disease claims relate to time periods before accurate testing was done of the level of hazardous workplace substances. The worker's own recollection of the level of exposure may be relatively subjective and difficult to substantiate. Faced with these workplace realities, the Tribunal has been willing to take a practical approach to evidence regarding exposure levels, to corroborate the worker's own testimony.

In *Decision No. 214/88* ("sealed building syndrome"), the Tribunal took into account the reports of complaints by co-workers of inadequate ventilation, low humidity and high heat in winter. In *Decision No. 1296/87*, the Panel deduced substantial exposure to chromic acid mist from corroborative symptoms, including a nasal septum perforation. In *Decision No. 211* (1988) the Panel was willing to accept indirect evidence of asbestos mining exposure, by way of an exposure report which had been done on another similar mine. Finally, in *Decision No. 224* (1986) (hearing loss), the Panel relied in part on sound surveys done after the worker left, by referring these back to the worker's testimony about earlier conditions.

It should be clear to practitioners, however, that uncorroborated evidence of exposure may well not convince a Tribunal Panel, and all efforts must be made to find the best evidence of exposure. Complaints by co-workers may often be the most

accessible source.

The use of medical/occupational health literature

Tribunal Panels in occupational diseases have proven themselves able to analyze and weigh extensive literature evidence. In general, the Panels are attempting to determine whether the literature supports a general link between exposure of the sort suffered by the worker and the type of medical condition which the worker has developed. Sometimes, the literature is relied on regarding a more precise problem in proving the case. For example, in *Decision No. 56/88*, (1988), (red cedar dust and asthma), regarding when symptoms would be expected to subside following the case of exposure to cedar dust.

The review of the literature is often combined with questions to and reports from expert witnesses - who are asked to interpret the literature. Even when the case is eventually decided on the basis of "disablement", epidemiological evidence is reviewed to assist in determining the theoretical basis of the claim. This was the case in *Decision No. 559/87* (whole body vibration and truck driving), for example.

Tribunal Panels will go to the literature with very precise questions. In *Decision No. 1296/87*, it was the differing hazards from different types of chromium compounds. In *Decision No. 495/87*, the issue was the relationship of nickel exposure to malignant lymphoma. In *Decision No. 239* (1986), the Panel determined that the literature did not show any relationship between cashier work and bursitis. And in *Decision No. 55/87* (1988), the Panel accepted expert evidence that there was a "classical" pattern of audiogram for noise-induced etiology in hearing loss cases.

Because of the Tribunal's respect for the trend of the medical literature, if a worker's theory of causation goes against the grain of the medical literature, there will have to be significant reasons (and usually a report from an authoritative expert) for the Panel to decide the case in the worker's favour. Thus, where the practitioner has obtained a supportive medical report from a specialist, it can be assumed that the Panel members will question the specialist as to why she/he departs from the views found in the medical literature.

Did the medical condition in the particular case result from exposure?

In determining whether the occupational exposure resulted in the medical condition suffered by the particular worker, the Tribunal will carefully examine the evidence as a whole for factors pointing one way or the other. Because of the tendency to found entitlement on a disablement rather than on an industrial disease basis, this enquiry will be centred on the specifics of the individual worker's exposure and the development of the symptoms of the medical condition.

Some Tribunal panels have begun the enquiry by asking whether there were any symptoms immediately corroborative of the exposure claimed. This was the case in *Decision No. 1296/87* (chromic acid mist), mentioned above. Then the Panel may ask whether these symptoms subsided once the worker had left the exposure. This will often show whether the symptoms had a work or non-work origin. In *Decision No. 56/88*, the fact that the asthmatic symptoms took three years to subside was not determinative against the worker's claim, because the medical literature showed that in cedar dust cases, symptoms often lasted long after cessation of exposure.

In delayed-onset cases (such as cancer), Panels will ask whether the onset came after the expected latency period. For example, even in a case of high exposure, if the cancer came on long before the expected latency period, this could point to non-occupational factors. In *Decision No. 1296/87*, the latency period was of the expected duration, and this was one factor leading the Panel to allow the appeal.

Panels have found it important in a number of cases to be very precise in the nature of the medical condition, to see whether that *particular* condition could have resulted from the claimed exposure. In *Decision No. 1296/87*, the *type* of lung cancer involved - small cell anaplastic bronchogenic carcinoma - was considered to be one which could be occupationally caused. In *Decision No. 774* (1987), a key issue was the lack of asbestos bodies in the biopsy samples done of lung tissue, but the Panel found that with the type of asbestos involved (chrysotyle), asbestos bodies would not necessarily be found.

Some Panels have asked whether there is any possible *non-occupational* cause for the medical condition, to aid them in determining whether there is an occupational cause. This was the case in *Decision No. 490* (1987), where the Panel enquired whether there was any underlying or alternative cause for the worker's "white finger disease", and determined that there was not (at pp. 10-11). The absence of any non-occupational cause is not, however, a substitute for evidence showing an *occupational* cause.

It can be seen that the factors which will be of importance in proving significant contribution will vary depending on the evidence in the individual case. The practitioner will have to look at the whole history of the exposure and development of the disability, to determine what key elements in the evidence point to

work-relatedness.

This often means that the practitioner has to approach an occupational disease case in two stages - an initial stage of reading and research, to familiarize her/himself with the medical background to the case, and then a second stage where the facts of the case are closely analyzed upon that background. The expert witness may be much more useful at that stage than at the earlier stage, where the practitioner may not know what questions to ask - and may thus prejudice a possible causation theory that emerges later.

GENERAL COMMENTS

A study of the Tribunal's stress and occupational disease decisions does not reveal a tendency to "open the floodgates". In the area of stress, the legal test adopted in *Decision No. 918* is one that raises very substantial barriers to successful claims. The test adopted in *Decision No. 1018/87* seems less stringent. However, the results in both cases seem to show that the Tribunal requires very substantial evidence before allowing a stress claim.

Regarding occupational disease, the Tribunal has taken a relatively cautious approach - hesitating to decide cases on the basis of "industrial disease", and deferring to the jurisdiction of the Industrial Disease Standards Panel. Workers have grounds to argue that the Tribunal's use of the "disablement" route in the recognition of what workers see as "industrial disease" has made it much more difficult and expensive to win entitlement. Workers could make similar arguments regarding the conservative approach to the use of the Schedule 3 presumption in *Decision No. 484IM*. On the other hand, the Tribunal has been willing to be practical regarding evidence of exposure, and has been creative in identifying factors which corroborate workplace contribution to occupational disease.

Employers could object to the Tribunal's willingness, in certain cases, to depart from established Board policies or guidelines, or from the views of Board doctors.

In the view of this writer, the Tribunal is producing carefully reasoned and balanced decisions in these two areas. Perhaps the perception of "opening the floodgates" has more to do with the comparison with the extremely restrictive approach to the old Appeal Board than with he reality of the Tribunal's approach.

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CALL FOR PAPERS

APPEL À TOUS LES AUTEURS

Joe Zaffino, Editor

In this issue of the *Compensation Appeals Forum*, we are pleased to present the long-awaited *Causation* issue. One of the factors contributing to the long wait for the publication of this issue was the shortage of material submitted to be considered for inclusion. This lack of contributions reflects a chronic problem with the *Forum* which jeopardizes the fulfilment of its mandate to provide a vehicle for the exchange of ideas relating to compensation-related matters.

We are confident that there is no lack of interest in the community with respect to the subject of workers' compensation. Its impact, not only on injured workers, but also on employers and all employees generally, is simply too great to be ignored. The strength of reaction to proposed amendments to the current workers' compensation legislation indicates the magnitude of that impact.

The *Forum* provides an opportunity to air views which will be assured of reaching an audience that is deeply interested and involved in the compensation process. An effective dialogue can thereby be established which will serve to increase awareness and understanding of compensation issues.

Community workers, consultants, the legal profession, trade unions, occupational health and safety specialists, the medical profession, the academic community and all others interested in the compensation process, are invited to submit material for publication in the *Forum*. Contributions may be written either in English or French.

We welcome the submission of papers, case comments, letters or replies to previous articles, which present analysis or constructive comments with respect to Tribunal decisions and processes or related compensation issues.

We urge you to take advantage of this opportunity to participate in a process which will lead to a more responsive compensation system that will better serve the public interest.

C'est avec plaisir que nous vous présentons finalement le dernier numéro du *Compensation Appeals Forum* qui traite du sujet de la *causalité*. Une des raisons du retard dans la parution de ce numéro est l'insuffisance d'articles soumis aux fins de publication. Cette pénurie d'articles reflète un problème chronique du *Forum* et compromet la réalisation de son mandat qui est de fournir un terrain d'échange d'idées dans le domaine de l'indemnisation des travailleurs accidentés.

Nous sommes persuadés qu'il existe un grand intérêt dans la communauté en ce qui concerne le système d'indemnisation des travailleurs accidentés. Ses répercussions, non seulement sur les travailleurs accidentés en particulier, mais sur tous les travailleurs et employeurs en général, sont trop fortes pour être ignorées. L'étendue de ces répercussions se manifeste dans la force des réactions provoquées par les modifications projetées de la Loi sur les accidents du travail.

Le *Forum* fournit l'occasion de présenter des opinions devant un public qui est profondément intéressé par et impliqué dans le système d'indemnisation. On peut, de cette façon, établir un dialogue efficace qui servira à faire connaître et à clarifier des questions concernant l'indemnisation des travailleurs accidentés.

Les travailleurs juridiques communautaires, les experts-conseils, les avocats, les syndicats, les spécialistes de la santé et de la sécurité au travail, le corps médical et les universitaires, sont tous invités à soumettre des articles, en français ou en anglais, aux fins de publication dans le *Forum*.

Nous cherchons des articles, des commentaires sur les décisions, des lettres ou des réponses aux articles déjà parus dans les numéros précédents, qui contiennent une analyse ou des commentaires sur les décisions et procédures du Tribunal ou sur toute autre question concernant l'indemnisation.

Nous vous encourageons à collaborer dans ce processus qui nous mènera vers un système d'indemnisation plus souple et qui ne perdra jamais de vue l'intérêt public.